COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS

1991

Nova Scotia

Department of Labour

Research Division

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92-05503/

COMPENDIUM OF GRIEVANCE ARBITRATION DECISIONS 1991

Nova Scotia Department of Labour
Research Division

Honourable Leroy J. Legere
Minister

H.R.Macdonald
Deputy Minister

ISSN: 0226-3890

FOREWORD

This publication is the twelfth summary of grievance arbitration decisions produced by the Nova Scotia Department of Labour. It is cumulative for 1991, and includes quarterly numbers 1 thru 4. The eleventh summary (1990) is forthcoming.

The decisions included here are those which have been filed in accordance with amendments to the Trade Union Act, effective May, 1978. On occasion, summaries of arbitrations outside the jurisdiction of the Act have been included. They are by no means representative of all arbitration cases outside the jurisdiction of the Trade Union Act, and have been included for general interest.

Results of appeals of arbitration decisions made to the Supreme Court of Nova Scotia are received by this Department on an ad hoc basis and are included in this publication accordingly.

Part I of the publication contains decision abstracts for 1991. Indices contained in parts II thru IV pertain only to the decisions for 1988, 1989, and 1991. A full, cumulative index is scheduled to be issued at a later date. Indexing standards for arbitration awards follow Canadian Labour Arbitration by D.J.M. Brown and D.M. Beatty (Agincourt: Canadian Law Book Co., 3rd edition, 1991).

Copies of decisions will be made available to interested parties upon request and will be subject to a nominal charge for reproduction. Arbitration decisions under the Trade Union Act are now abstracted and indexed on a computerized database using InMagic software. The Department may provide copies of the database upon special arrangement. Please address all inquiries relating to printed and machine-readable formats to:

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February, 1992

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1991

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Part 1

GRIEVANCE ARBITRATION DECISIONS

1991

DECISION: 91-001

Glace Bay (Town) AND Canadian Union of Public Employees, Local 755

MacDonald, David J. - Arbitrator

Kevin MacNeil, for the Union
Reeves Matheson, for the Employer

January 3, 1991

ISSUES: Skill and ability 6:3000 - Arbitral review 6:3100 - Senior employee if relatively equal 6:3220, - Criteria of ability and qualifications 6:3300 - Requirements of the job 6:3100.

CIRCUMSTANCES: The grievor claims that he should have been awarded a position as he is a more senior employee than the successful candidate. The Union argues that the Employer failed to assess the grievor's qualifications properly.

AWARD: The grievance fails. The seniority clause is a competitive one. Management has the right to determine the appropriate qualifications and assign relative weights to them. It assessed the applicants fairly, honestly and without discrimination. The experience of each applicant was considered. The Union has not proved that the difference in the point score of the grievor and the successful candidate was not significant.

DECISION: 91-002

Findex Structures Inc. AND Labourer International Union, Local 1115

Scaravelli, N.M. - Arbitrator

Raymond Larkin, for the Union
Malcolm MacLeod, for the Employer

January 8, 1991

ISSUES: Discipline and discharge - Procedural limitations on discipline 7:2100; Promotion, demotion and transfer - Demotion or transfer - Non-disciplinary - Responsibility of employer 7:3546, Reasonableness 6:3100 ; Skill and ability - Arbitral review 6:3100; Remedies - Type of grievance - Failure to follow discipline procedure 7:2100; Unsuitability 7:3530; Progressive discipline - Warning 7:4416.

CIRCUMSTANCES: The employer specialized in concrete construction work. The grievor was hired as a working foreman and was entitled to a wage premium under the agreement. His responsibilities included assigning work to other labourers and operating concrete damping equipment. The quality of the grievor's work in compacting concrete columns was deemed unacceptable. He was demoted from working foreman to general labourer. The union claimed the grievor's demotion was without just cause and was a violation of the agreement's discipline procedures. The employer argued that the grievor was found not to have the job skills required for the position and that management rights in the agreement allowed it to appoint another working foreman.

AWARD: The grievance succeeds. There was no evidence to support the employer's argument that an ability to operate special equipment was a condition precedent to the hiring of a working foreman. The employer's refusal to pay the grievor the foreman's premium pay rate, and the subsequent hiring of another foreman constituted discipline by way of demotion. The employer failed to establish just cause for the grievor's demotion. Mandatory language in the agreement required the employer to comply with stated discipline procedures. The grievor shall be reinstated to working foreman effective the date of his hiring and shall be paid accordingly. Jurisdiction is retained to deal with the amount of compensation if the parties are unable to agree.

DECISION: 91-003

All Steel Builders Ltd AND Sheet Metal Workers International Assn., Local 409

Scaravelli, N. M. - Arbitrator

n/a, for the Union
n/a, for the Employer

January 14, 1991

ISSUES: Remedies - Type of remedy - Compliance order 2:1450.

CIRCUMSTANCES: The Employer admits owing money for benefits to fifteen employees.

AWARD: A consent award is issued specifying amounts and payment dates. If the Employer fails to pay on schedule, the Union may have the award filed and enforced by the Nova Scotia Supreme Court.

DECISION: 91-004

Eastern Valve and Controls Ltd. AND Sheet Metal Workers Assn., Local 56

O'Connell, Charles - Arbitrator

Gordon Forsythe, for the Union
David Muggah, for the Employer

January 23, 1991

ISSUES: Union - Security - Check off 9:1200; Pension plans 4:1400.

CIRCUMSTANCES: The union claimed that the employer violated the agreement by failing to remit dues and benefits. After deliberation, the parties mutually agreed on the amount of employer contributions and dues owed to the union.

AWARD: The employer will pay the union the amount of dues and benefits specified by the award.

DECISION: 91-005

Halifax (Municipality of the County) AND Sackville Professional Firefighters Assn., Local 257

Outhouse, Bruce - Arbitrator

Gordon Forsyth, for the Union
Tom Donovan, for the Employer

January 24, 1991

ISSUES: Discipline and discharge - Grounds for - Absence from work - Innocent distinguished 7:3200, - Alteration of grounds 7:2200; Innocent absenteeism 7:3210.

CIRCUMSTANCES: The grievor suffered an injury at work, leading to extended absences. The grievor eventually underwent surgery and was, at the time of the hearing, fit and able to return to work. The Employer discharged the grievor for excessive absenteeism, and also cites his failure to keep the Employer informed of his medical condition and the expected date of the surgery. The Employer also seeks the return of various items of clothing and uniforms supplied to the grievor when he was employed, or alternatively to receive compensation for the value of these items from vacation pay and other benefits due the grievor. The Union argues that there was no excessive absenteeism, that the Employer had

a duty to warn the grievor that the grievor was entitled to benefits under the collective agreement at the time of the dismissal, that the grievor was not guilty of culpable misconduct in failing to keep the Employer informed, and finally that the grievor is entitled to keep the clothing and uniforms. The grievor seeks to be reinstated with full compensation.

AWARD: The grievance succeeds. The evidence on the grievor's future ability to attend work favours him. He does not have a record of habitual absenteeism; the absences in question derive from a specific injury which now appears to be rehabilitated. The Employer failed to seek a second medical opinion, or to ask the grievor's physicians about the probable outcome of the surgery. For this reason, it is not necessary to determine whether the date of the hearing or the date of the dismissal is the key date on which the assessment of the grievor's future ability to attend work was made. Further, even in cases of innocent absenteeism, the Employer has a duty to warn the employee that employment is at risk. Also, innocent absenteeism can be invoked as a ground of discharge where a work-related injury prevents an employee from returning to work, provided the employee is not deprived of any benefits to which s/he is entitled under the collective agreement. The alleged misconduct of the grievor in failing to keep the Employer informed is seen as an attempt to change the grounds for the dismissal, and is not allowed. While the grievor did fail to communicate with the Employer, a written reprimand would be the most appropriate penalty for that misconduct. No order is made with respect to compensation. At the request of the parties, this is left for them to work out, with jurisdiction retained to deal with the matter in the event they are unable to reach an agreement. Finally, it is not necessary to deal with the issue of the clothing and uniforms.

DECISION: 91-006

Nova Scotia (Department of Transportation & Communications) AND Canadian Union of Public Employees, Local 1867

Cromwell, T.A. - Chair; Cooper, Glenda; North, G.I.

F.A. Sommerville, for the Union
Jonathan Davies, for the Employer

January 24, 1991

ISSUES: Progressive discipline 7:4314; Disciplinary penalties - Arbitral review - Substitution of penalty 7:4000, - Disciplinary record 7:4310, - Progressive discipline 7:4422; Discipline and discharge - Grounds for - Damage to employer's property 7:3410; Remedies - Types of remedy - Reinstatement 2:1470.

CIRCUMSTANCES: The grievor was discharged for taking a departmental truck for personal use without the employer's permission and subsequently damaging the vehicle.

The grievor's previous disciplinary record included a one-year suspension for theft of the employer's property. The union claimed that if just cause existed for the imposition of discipline, discharge was not reasonable in the circumstances and should be substituted by a lesser penalty. Employee testimony showed that the employer's vehicles had been used occasionally for unauthorized personal use.

AWARD: The grievance succeeds; however, just cause for discipline exists. In the absence of a specific rule or policy forbidding such use, employees generally understood that unauthorized personal use of the employer's vehicles was a serious infraction. However, the lack of a specific rule, and the lack of enforcement by the employer, tend to mitigate the grievor's misconduct. The present infraction, in light of the grievor's prior offence of theft, shows a continuing disregard for, and improper use of, the employer's property. However, there is enough dissimilarity between these two offences to allow the use of progressive discipline. Therefore discharge is unreasonable and should be replaced by probationary reinstatement according to the terms of this award. The grievor is to be reinstated without compensation and without regard for seniority lost from the date of his discharge. The grievor shall reimburse the employer for damage he caused to the employer's vehicle. Jurisdiction is retained to determine the amount of such reimbursement if the parties cannot agree.

DISSENT: (North) The employer's penalty of discharge is just and reasonable because the grievor's past and present conduct has fundamentally breached the specific employment relationship between the grievor and the employer. Where the grievor's previous termination for theft was substituted by a one-year suspension, he is not entitled to the protection of progressive discipline for any wrongful conduct.

DECISION: 91-007

Halifax Water Commission AND Canadian Union of Public Employees, Local 1431

Outhouse, Bruce - Arbitrator

Alex Somerville, for the Union
Paul Murphy, for the Employer

January 30, 1991

ISSUES: Arbitrability - Matters arising outside of the collective agreement 2:1200; Jurisdiction - Sources of - Collective agreement 2:1200.

CIRCUMSTANCES: The Union argues certain classifications were improperly evaluated in a job evaluation study conducted by the Employer during the term of the previous collective agreement. The Union attempted to secure wage improvements to these

classifications during the negotiations for the present collective agreement, but later took the issue off the table. The current collective agreement includes an agreed rate of pay for each classification. The Union concedes that the employees are properly classified, but seeks a proper evaluation, with adjustment of salaries and benefits. The Employer raised a preliminary objection to the jurisdiction of the arbitrator to hear the matter.

AWARD: The grievance is dismissed as the arbitrator finds he lacks jurisdiction to hear the issue. There is no authority in the collective agreement to re-evaluate existing classes or to vary the pay of classes, as distinguished from reclassifying an employee.

DECISION: 91-008

Technical University of Nova Scotia AND Technical University of Nova Scotia Faculty Assn.

MacDougall, R. Lorne - Arbitrator

Helene Bibeault, for the Union
Eric Durnford, for the Employer

February 1, 1991

ISSUES: Arbitrability - Matters arising outside of collective agreement 2:1200; Jurisdiction - Sources of - Collective agreement 2:1200.

CIRCUMSTANCES: The grievor claims to have been appointed as a Research Associate Professor, and seeks implementation of the appointment with benefits and salary. The Employer denies that the grievor was ever appointed to the faculty.

AWARD: The grievance is dismissed. After reviewing the events leading up to the grievance, the Arbitrator is satisfied that the grievor is not and never has been a member of the faculty. The appropriate procedure as set out in the collective agreement for appointing a faculty member was not followed. The conduct of the grievor and the Employer is consistent with the grievor not being appointed to the faculty. The grievor is not covered by the collective agreement; the matter is not arbitrable.

DECISION: 91-009

Northside Community Guest Home AND Canadian Union of Public Employees

Outhouse, Bruce - Arbitrator

Kevin MacNeil, for the Union
David Ryan, for the Employer

February 5, 1991

ISSUES: Evidence - Admissibility - Relevance 3:4200; Job posting - Criteria - Physical qualifications 6:3360; Skill and ability - Criteria of ability and qualifications - Physical capabilities 6:3360, Requirements of the job 6:3100; Illness or disability - Effect on employee - Ability to do the job 6:3360; Promotion, demotion and transfer - Reasonableness 6:3100 ; Reasonableness - Skill and ability 6:3100.

CIRCUMSTANCES: The grievor was employed part-time as a dietary aide in a nursing home. She had a long history of extensive work absences, based on legitimate sick leave. In a competition for a full-time position, the employer selected a job applicant with less seniority than the grievor, on the grounds that the grievor's attendance record indicated an inability to maintain the regular attendance required of a full-time employee. The union argued that an employee's past history of work attendance should not have been used to disqualify her from promotion to a full-time position. In the alternative, it claimed the employer erred by not selecting the most senior applicant to possess the required skills and abilities. As remedy, it asked that the grievor's status be changed to that of a regular full-time employee. The employer argued the grievor lacked the physical qualifications required for the full-time position. The job posting stipulated job applicants had to be in good health. Therefore the decision to award the position to a less senior candidate was fair and reasonable, based on the grievor's past health and attendance problems.

AWARD: The grievance fails. The employer is entitled to consider an employee's past attendance record when assessing her physical qualifications for promotion. Based on the grievor's previous history of work absences, the employer's decision not to promote her is neither arbitrary, discriminatory nor unreasonable. Furthermore, when an employee has a long-standing attendance problem, the employer is entitled to draw a negative inference regarding future attendance unless the employee achieves and then maintains a reasonable standard of attendance for a reasonable period of time.

DECISION: 91-010

Sifto Salt Division, Domtar Chemicals Group of Domtar, Inc. AND Energy and Chemical Workers Union, Local 824

Darby, Peter E. - Arbitrator

Eric Batten, for the Union
Patrick Thomson, for the Employer

February 4, 1991

ISSUES: Discipline and discharge - Grounds for - Carelessness 7:3520; Carelessness 7:3520; Safety - Equipment and clothing 8:4100; Company rules 4:1500 - Safety equipment 8:4100.

CIRCUMSTANCES: The Grievor was twice disciplined for failing to warn others present in the welding shop that he was about to begin work with the grinder. The Employer states that it was a company rule that warnings should be given so that others could put on protective glasses or goggles. The first incident resulted in a warning letter being placed in the Grievor's file, and the second resulted in a suspension without pay. The Grievor argues the rule did not exist, and therefore there are no grounds for discipline.

AWARD: The grievances fail. There is an implied duty to work safely, with due regard for the safety of others. The Employer's concern with safety was known to the Grievor. No reasonable employee would believe that he was entitled to act as the Grievor did. It is a matter of common sense and self-protection, and does not depend on the existence of a formal rule. The Grievor's conduct in the first incident warranted discipline. The action taken was appropriate. The failure of the Grievor to appeal this discipline until after receiving a disciplinary suspension for the second incident is seen as a strong suggestion that the Grievor knew he was at fault in the first incident. After the first incident, the Grievor was certainly aware of his duty to work safely and to warn others. His failure to do so breached the duty to work safely. Discipline was justified and the penalty is appropriate. The letters from the Employer to the Grievor make it clear that discipline was imposed in both instances for the breach of the duty to work safely, not for breaking a company rule. The arbitrator went on to comment on unilaterally imposed rules, and to suggest a process for clearly communicating the rules to the union and employees. The arbitrator suggests there was insufficient evidence of a rule to sustain disciplinary penalties.

DECISION: 91-011

Ocean View Manor AND Canadian Union of Public Employees, Local 1245

Outhouse, Bruce - Chair; Weir, Charles; Clarke, Winston

Corinne Budgell, for the Union
Maureen Reid, for the Employer

January 25, 1991

ISSUES: Statutory holidays - Holiday pay and other benefits 8:3140, Sick leave benefits 8:3330; Vacation - Computation of vacation and vacation pay - Sick 8:3330, Other benefits 8:3250; Interpretation - Intention of the parties 4:2100; Insurance and welfare plans - Entitlement to benefits 4:2100.

CIRCUMSTANCES: Grievors G and S were full-time aides in a nursing home. By working on scheduled holidays, they accumulated additional amounts of vacation time. Grievor G submitted a written request for holiday leave which her employer approved. Prior to her vacation, however, G reported off sick, and remained on sick leave for six consecutive days. On her return to work, her sick leave claim requested that she be paid sick leave for the day scheduled as a holiday and that she be permitted to take the holiday at a later date. The employer paid for the approved day off as a holiday but denied G's request for an additional holiday. Similarly, grievor S had scheduled vacation time which she was unable to use because of illness. She then requested the scheduled holidays be substituted with her sick leave days. The employer denied the substitution on the grounds that the days were originally scheduled as holidays which did not entitle her to sick leave. The grievors argued the employer wrongfully denied them of holidays to which they were entitled under the agreement by refusing to grant sick leave for those days initially scheduled as holidays. As remedy, the union asked that the grievors' time missed through illness be considered sick leave and that their vacation credits be increased by the number of days lost to illness. The employer argued the union sought payment of sick leave on paid holidays and that this claim constituted double payment, or pyramiding of benefits. Based on the agreement, no pyramiding of benefits was permitted.

AWARD: The grievances fail. The issue is not one of double payment or pyramiding of benefits. Instead, a proper determination is based on clear language in the agreement dealing with sick leave. Sick leave entitlement applied only to normal working days. The days claimed by the grievors had been scheduled as holidays.

DISSENT: (Weir) [No written dissent filed with decision.]

DECISION: 91-012

A.J. Acheson Sales Ltd. AND Canadian Brotherhood of Railway, Transport & General Workers, Local 621

MacDonald, David J. - Arbitrator

Victor Tomiczek, for the Union
Eric Durnford, for the Employer

February 22, 1991

ISSUES: Statutory holidays - Qualifying days 8:3120, 4:2100, Vacation or leaves of absence 8:3125; Interpretation - Intention of the parties 4:2100.

CIRCUMSTANCES: The grievor was a part-time cashier whose initial two week vacation selection was rescheduled by the employer to take place during August. She returned to work near the end of that month. The employer claimed that she was not entitled to holiday pay for Labour Day because she had not worked 15 of the previous 30 days required by the agreement to qualify for holiday entitlement. The grievor argued that because the employer rescheduled her vacation during mid-August, she was prevented from working the required qualifying period prior to Labour Day. Therefore the grievor should not have been penalized by the employer's scheduling decision.

AWARD: The grievance fails. The agreement specifically requires that part-time employees work the qualifying period prior to a holiday in order to receive holiday pay. Because there is no stated exception to this requirement, the clear intention of terms in the agreement must be followed.

DECISION: 91-013

Cape Breton District School Board AND Canadian Union of Public Employees, Local 781

McDade, Bruce R. - Chair; Sampson, A. Robert; Tomiczek, Victor

Frank L. Elman, for the Union
Eric Durnford, for the Employer

February, 1991

ISSUES: Management rights 4:2310, Revision of job content 5:2200; Job classifications and descriptions - Creation or revision 5:2200; Arbitrability - Procedural limitations - Policy

and individual grievances 2:3210, Form of grievance 2:3122, Subject matter limitations 2:1300; Jurisdiction - Sources - Submission to arbitration 2:1300.

CIRCUMSTANCES: The grievor was employed by a school board as a student aide. She grieved the employer's decision that student aides be responsible for administering oral medication to special education students, and claimed this responsibility belonged to the classroom teacher. The union claimed the employer's unilateral change of the grievor's job description was a violation of the agreement. The employer argued that management rights in the agreement gave it the authority to modify job descriptions. It further argued that because the grievance did not allege a violation of specific terms in the agreement, the matter was beyond the jurisdiction of the arbitration board.

AWARD: The grievance fails. The job descriptions of student aides do not form part of the agreement. Where the employer's assignment of duties is not unreasonable, there is no violation of the agreement. No grounds exist for the board to interfere with the employer's decision.

DECISION: 91-014

Truro (Town) AND Canadian Union of Public Employees, Local 734

MacLellan, J.A. - Arbitrator

Robert Crockett, for the Union
John Rafferty, for the Employer

February 18, 1991

ISSUES: Work assignment 5:1000 - Bargaining unit work 5:1200.

CIRCUMSTANCES: Each of five grievors is claiming the minimum four hours overtime pay for work done by the foreman during a rainstorm. The evidence shows that the Foreman spent about forty-five minutes one evening clearing catch basins of leaves to prevent flooding. The foreman indicated that he considered the first site to have been an emergency situation. He then visited other sites prone to flooding, and cleared them. The Employer argues that the principle of De minimus non curat lex applies, as the work involved was minor in nature.

AWARD: The grievance succeeds in part. The foreman was performing work which was properly bargaining unit work. Even if the first site is properly characterized as an emergency, clearing the other sites is more than a minimal involvement. The collective agreement indicates that while the foreman may do bargaining unit work in an emergency, where there are bargaining unit members available to do the work, they should be called.

Bargaining unit members were available, and the need to do the work could have been readily foreseen. However, as only one employee would have been needed to do the work, the Arbitrator does not deem it proper to award compensation to all of the grievors. No overtime pay is awarded.

DECISION: 91-015

Nova Scotia (Department of Transportation & Communications) AND Canadian Union of Public Employees, Local 1867

Veniot, Milton J. - Arbitrator

Alex Sommerville, for the Union
Jonathan Davies, for the Employer

February 21, 1991

ISSUES: Work assignment 5:1000 - Bargaining unit work 5:1200, 6:2000; Overtime 5:3200 - Distribution of overtime 5:3220 - Persons normally performing 5:3222; Overtime 5:3200 - Right to claim 5:3220; Bargaining unit - Work assignment 5:1200.

CIRCUMSTANCES: The grievors claim overtime pay for dispatching work done by management personnel during a week of bad weather before the "official" start of the winter season. The grievors would normally perform this work during the winter season.

AWARD: The grievance succeeds. There is an implied prohibition against the assignment of bargaining unit work to non-bargaining unit personnel. This was normally bargaining unit work. It would have been overtime work. The grievors are to be compensated for the shifts for which they would have been available at the appropriate overtime rate.

DECISION: 91-015.A

Nova Scotia (Department of Transportation & Communications) AND Canadian Union of Public Employees, Local 1867

Davison, J. (NSTD)

Susan Dee Coen (Respondent), for the Union
Jonathan Davies (Applicant), for the Employer

September 9, 1991

ISSUES: Judicial review 1:5000 - Grounds for review - Excess of jurisdiction 1:5300.

CIRCUMSTANCES: This is an application to quash and set aside an arbitral award. The Employer argues misconduct under s.15 of the Trade Union Act is equivalent to an error of law or jurisdiction. The Employer submits the arbitrator exceeded his jurisdiction by altering the collective agreement.

AWARD: The application fails. The standard of review is whether the findings of the arbitrator were patently unreasonable. Implying a term in the collective agreement was an interpretive act, and this is the role of the arbitrator. The article of the agreement in question will reasonably bear the interpretation given it. The arbitrator did not change, alter, or modify the agreement in reaching his decision.

SEE ALSO: 90-015

DECISION: 91-016

Nova Scotia (Department of Transportation & Communications) AND Canadian Union of Public Employees, Local 1867

Veniot, Milton J. - Arbitrator

Alex Sommerville, for the Union
Jonathan Davies, for the Employer

February 21, 1991

ISSUES: Work assignment - Contracting out - Employees outside unit 5:1400, During lay-off 5:1400, Remedies 5:1500; Good faith - Assignment of work 5:1400; Interpretation - Words and phrases - Bargaining unit work 5:1200; Bargaining unit - Work assignment

5:1200; Remedies - Type of grievance - Work assignment within unit 5:1500, Types of remedy - Compliance order 2:1450; Supervisors - Bargaining unit work 5:1400.

CIRCUMSTANCES: The grievor was a division crewman whose normal seasonal term of employment was from early summer to early winter. During the spring lay-off period, the grievor claimed that foremen who were not members of the bargaining unit were assigned work which would normally be done by the grievor. As remedy, he claimed lost wages, seniority and other benefits.

AWARD: The grievance succeeds in part. Nothing in the agreement specifically prevents the employer from assigning work outside the bargaining unit. However, where it can be determined that work covered by the agreement can be characterized as bargaining unit work, there is an implied prohibition against the employer assigning such work outside the bargaining unit. Based on the evidence, one episode described by the grievor did constitute an assignment of bargaining unit work to management. However, there was no evidence the grievor would have been assigned the work rather than a more senior bargaining unit employee. Therefore there is no award for lost wages or benefits. Instead, the spring work performed by the employer's foremen which, by its degree, constitutes bargaining unit work, shall in future be performed by the appropriate bargaining unit employee.

DECISION: 91-017

Conseil Scolaire Clare-Argyle District School Board AND Nova Scotia Teachers Union

Outhouse, S. Bruce - Arbitrator

n/a, for the Union
n/a, for the Employer

February 19, 1991

ISSUES: Grievance - Settlement of grievance 2:3230.

CIRCUMSTANCES: The grievor, a school teacher, claimed five days of special leave according to terms in the agreement. She grieved the Board's decision to grant only two days leave.

AWARD: The grievance was withdrawn.The parties reached an agreement before the matter went to arbitration. The grievor was given an additional one and one-half days of special leave with pay.

DECISION: 91-018

Scotsburn Co-operative Services Ltd. AND Retail, Wholesale & Department Store Union, Local 1015

Evans, L. K. - Arbitrator

Roseanne Skoke, for the Union
James Leefe, for the Employer

February 22, 1991

ISSUES: Interpretation - Intention of the parties 4:2100; Management rights 4:2300, 4:2310; Bonuses - Alteration of gratuitous bonuses 8:1400; Workers' compensation 8:3300, 8:3230; Statutory holidays - Holiday pay and other benefits 8:3140, Computation of vacation pay 8:3230, Sick leave benefits 8:3330; Pyramiding of benefits 8:3140, 8:3250, 8:3330.

CIRCUMSTANCES: The grievor claimed he was entitled to receive an employee's Christmas bonus when he was absent from work due to a work-related injury. In a second grievance, he further claimed he was entitled to be compensated for statutory holidays specified in the agreement while he was absent from work and in receipt of Workers' Compensation benefits. The union argued that because the grievor continued to be an employee during the period of his absence from work, he could not be denied statutory holiday pay or fringe benefits in the absence of clear language in the agreement permitting such a denial. The employer argued that because it has followed the same policy in the past, the union is now estopped from pursuing the grievances.

AWARD: The first grievance fails. Nothing in the agreement requires the employer to pay Christmas bonuses. It is a management right to establish or modify its policy on Christmas bonuses. In the past, employees who were absent from work due to illness or injury and who were receiving disability benefits did not receive a Christmas bonus. The second grievance succeeds. The agreement requires the employer to pay an employee for a specified statutory holiday if the employee has not worked that day. Nothing in the agreement allows the employer to deny an employee holiday pay benefits while the employee is receiving Workers' Compensation benefits. The doctrine of estoppel cannot be relied upon simply because the union has not previously grieved the issue. As remedy, the grievor shall be paid for all holidays specified in the agreement which have accrued since the date of his injury.

DECISION: 91-019

Ellis Don (Atlantic) Ltd. AND United Brotherhood of Carpenters & Joiners of America, Local 83

Kydd, William H. - Arbitrator

Raymond F Larkin, for the Union
Bob Smith, for the Employer

February 6, 1991

ISSUES: Work assignment 5:1000 - Contracting out 5:1300.

CIRCUMSTANCES: The Employer sub-contracted with a company which privately hired four union members to work on the job site. These workers were paid wages in accordance with the collective agreement, but benefits were not paid. The Union alleges the sub-contractor deprived union members of work, as requests for carpenters were filled from an out-of-work list maintained by the Union. The Union claims damages on behalf of those who would have been entitled to work if the Employer and the sub-contractor had proceeded in accordance with the collective agreement.

AWARD: The grievance succeeds. The provisions of the collective agreement not only require union members to be hired, but also give the Union substantial rights in determining who is to be hired. The behaviour of the sub-contractor was caused by the failure of the Employer to comply with the collective agreement. Damages are awarded to the Union in trust for those union members who were unemployed and who would have been entitled to do the work in question.

DECISION: 91-020

Clarke Transport Canada Inc. AND International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 927

MacLellan, J.A. - Arbitrator

Susan Coen, for the Union
Karin McKaskill, for the Employer

February 28,1991

ISSUES: Discipline and discharge - Grounds for - Absence from work - Failure to notify employer 7:3110, Fighting or threatening 7:3430, Refusal to obey instructions 7:3610, 7:3612; Disciplinary penalties - Mitigating factors - Employment record 7:4428

CIRCUMSTANCES: The grievor was given a three day suspension for repeatedly failing to call in one hour prior to a scheduled shift when he was unable to report for work. The grievor argued this suspension was unfair. In a later incident, the grievor verbally threatened several co-workers and challenged them to a fight during a lunch break. He was ordered by his supervisor to return to work, but instead the grievor returned to the lunchroom to threaten other workers. The employer then terminated the grievor's employment. The grievor admitted the lunchroom incidents but claimed in mitigation that he did not intend to intimidate anyone.

AWARD: The grievance succeeds in part. The employer had just cause to discipline the grievor for failing to advise the employer that he was unable to work his shift; the suspension however is reduced to two days. The employer also had just cause to discipline the grievor for threatening behaviour. However, based on the grievor's past work record, the discharge shall be replaced by suspension. The suspension, with no compensation for lost wages or benefits, shall include the period from the date of his dismissal to the date of this award.

DECISION: 91-021

Gem Construction Specialists Ltd. AND United Brotherhood of Carpenters & Joiners of America, Local 83

Mont, Stephen K. - Arbitrator

n/a, for the Union
n/a, for the Employer

March 12, 1991

ISSUES: Work assignment - Contracting out 5:1300; Bargaining unit - Contracting out of 5:1300; Contracting out 5:1300; Grievance - Settlement of grievance 2:3230.

CIRCUMSTANCES: The union alleged the employer violated the agreement by employing non-union workers on a job site within the union's jurisdiction. The employer admitted it violated the agreement.

AWARD: The employer will pay the union the amount which would have been earned by a journeyman carpenter during the term of the project. Should the employer fail to pay the amount specified in the award, the union may proceed to have the award enforced by the Nova Scotia Supreme Court.

DECISION: 91-022

Northwoodcare Inc. AND Canadian Brotherhood of Railway, Transport & General Workers, Local 606

Cromwell, T.A. - Arbitrator

Gordon Forsyth, for the Union
Kenneth Fowlie, for the Employer

March 5, 1991

ISSUES: Schedules 5:3100; Management rights 5:0000 - Schedules 5:3100; Statutory holidays 8:3100.

CIRCUMSTANCES: The Employer scheduled Good Friday and Easter Monday of 1990 as days off for all maintenance employees. This was contrary to past practice, when the employees were asked whether or not they wished to work statutory holidays falling on a Monday to Friday. The Union claims this re-scheduling violates a provision of the collective agreement.

AWARD: The grievance succeeds. The provisions of the agreement are ambiguous and evidence of past practice and negotiating history are admissible. The evidence indicates there was a schedule for full- time employees' statutory holidays, and that the Employer unilaterally altered this. This violated the agreement. The employees who were improperly denied the opportunity to work should be compensated for the loss of that opportunity.

DECISION: 91-023

M.C.L. Mechanical Ltd. AND International Assn. of Bridge, Structural & Ornamental Iron Workers, Local 752

Scaravelli, N.M. - Arbitrator

Gordon Forsyth, for the Union
John MacPherson, for the Employer

March 7, 1991

ISSUES: Estoppel 2:2200, 2:2210, Condonation 2:2220; Condonation 2:2220; Wages 8:1000.

CIRCUMSTANCES: Several employees were hired by the employer to work at a non-union job site. The employees later applied for and received union certification. Their grievance alleged the employer refused to pay the wages and benefits specified by an existing collective agreement, and, as remedy, they sought compensation for lost wages and benefits from the date of union certification. The employer argued that because the union's initial grievance claimed only compensation for wages, it is now prohibited from claiming additional benefits.

AWARD: The grievance succeeds in part. The employer's non- compliance with the agreement was induced by the union's representation and conduct from the time of certification to the time the grievance was filed. Therefore the union is estopped from claiming compliance prior to the date of its grievance. However, the employer ought to have known that the grievance involved compliance with both wage and benefit provisions in the agreement. The employer is ordered to pay to the union all wages and benefits due according to the agreement, from the date the grievance was filed. Jurisdiction is retained to determine quantum of damages if the parties are unable to agree.

DECISION: 91-024

National Sea Products Ltd. AND National Automobile, Aerospace & Agricultural Implement Workers of Canada (CAW-Canada)

O'Connell, Charles - Arbitrator

Leo McCormack, for the Union
David Reid, for the Employer

March 18, 1991

ISSUES: Theft 7:3310.

CIRCUMSTANCES: Three theft-related grievances were filed.

AWARD: At the hearing, one was dismissed as the Union did not offer any evidence. A second was adjourned, and will be heard before another arbitrator. The third was settled by agreement.

DECISION: 91-025

Glen Haven Manor Corp. AND Canadian Union of Public Employees, Local 2330

Darby, Peter E. - Chair; Hennick, Kenneth; Lynn, John

Robert Crockett, for the Union
Peter McLellan, for the Employer

February 15, 1991

ISSUES: Pregnancy - Leave - Vacation pay 8:3220, 8:3250.

CIRCUMSTANCES: The grievor alleged that the employer violated the agreement and the Nova Scotia Human Rights Act, s. 11, by prorating her vacation benefits while she was on unpaid maternity leave. The union claimed that the grievor's pregnancy constituted a physical disability within the meaning of the Act and that the employer's decision to prorate her vacation benefits was therefore discriminatory. The employer argued that its practice of prorating benefits for the periods that bargaining unit employees were on unpaid maternity leave did not violate the Act.

AWARD: The grievance fails. Under the agreement, any employee taking an unpaid leave of absence would have vacation entitlement prorated. Therefore there is no discrimination in the employer's practice. Further, pregnancy is neither a physical disability nor an illness. Consequently, there is no violation of the Nova Scotia Human Rights Act, s. 11.

DECISION: 91-026

Metropolitan Authority AND Halifax Civic Workers Union, Local 108

MacDougall, R. Lorne - Arbitrator

David W. Fisher, for the Union
Terry L. Roane, for the Employer

March 21, 1991

ISSUES: Discipline and discharge - Grounds for - Attitude 7:3580, 7:3660, Failure to get along with work mates 7:3580, Refusal to obey instructions 7:3610, 7:3612, Evidence - Final incident 7:4312, Prior record 7:4310, 7:4314.

CIRCUMSTANCES: The grievor's employment was terminated for failing to carry out his job duties following a series of warnings and attempts by the employer to improve the grievor's work performance. The grievor had previously been suspended and demoted for fighting with another employee. The employer further claimed the grievor was unwilling and unable to change his attitudes and work habits. In the alternative that just cause did not exist for dismissal, compensation should be paid to the grievor with no reinstatement. The grievor alleged that he was unjustly dismissed and, as remedy, sought reinstatement and appropriate compensation.

AWARD: The grievance fails. Based on the evidence, the grievor's attitude problems seriously affected his working relationship with the employer. In the circumstances, progressive discipline would not have altered the grievor's attitude. Discharge was not excessive and the employer had just cause.

DECISION: 91-027

Nova Scotia Liquor Commission AND Nova Scotia Government Employees Union, Local 470E

MacDonald, David J. - Arbitrator

Kim Turner, for the Union
Maureen Reid, for the Employer

March 14, 1991

ISSUES: Overtime - Distribution of overtime 5:3220, Persons normally performing 5:3222; Management rights - Arbitrariness and discrimination 5:3220; Past practice 3:4430.

CIRCUMSTANCES: The grievors were warehouse supervisors who alleged that they were repeatedly denied overtime assignments when warehouse supervisors with less seniority were allowed to work overtime. Both parties agreed that nothing in the agreement specified how overtime was to be distributed; no language existed to require the distribution of overtime according to seniority. However, the agreement's grievance procedure did allow a grievance in matters not specifically covered by the agreement. The union claimed that in the absence of specific overtime language, the employer was required to exercise management rights in a just manner and that the existing practice of distributing overtime was arbitrary and discriminatory.

AWARD: The grievances fail. Because there is no express language in the agreement dealing with overtime assignment, past practice is relevant in determining the matter. That evidence shows that supervisors were assigned overtime on the basis of the area of operations requiring additional work. There was no discrimination or arbitrariness in the employer's method of overtime assignment.

DECISION: 91-028

Maritime Paper Products Ltd. AND Canadian Paperworkers Union, Local 1520

MacDonald, David J. - Chair; Blanchard, Greg; Durnford, Eric

Ron Pink, for the Union
Donald H. McDougall, for the Employer

February 28, 1991

ISSUES: Discipline and discharge - Grounds for - Insolent behaviour or obscene language 7:3660; Discipline and discharge - Grounds for - Refusal to obey instructions 7:3610, 7:3612; Disciplinary penalties - Mitigating factors 7:4400 - Apology 7:4422; Disciplinary penalties - Mitigating factors 7:4400 - Employee's State of Mind 7:4424; Disciplinary penalties - Mitigating factors 7:4400 - Personal or emotional problems 7:3430; Disciplinary penalties - Mitigating factors 7:4400 - Rehabilitative potential 7:4422; Medical examination 7:3220, 7:3230, 7:3250.

CIRCUMSTANCES: The grievor was discharged for misconduct. The union does not dispute the conduct but argues that because of the grievor's mental condition, he was not responsible for his actions, and should not be held accountable; or that his mental condition should be considered in mitigation of the penalty. The Employer made a preliminary application requesting that the grievor undergo a psychiatric examination. This motion was denied, but the Board indicated that a similar motion could be made after the Union had presented its evidence. This was done. While the Board was unanimous in agreeing that the grievor should undergo a psychiatric examination, Mr. Blanchard dissented from the majority in agreeing that this examination should be made by the psychiatrist retained by the Employer. The majority of the Board indicated that the credentials and qualifications of this psychiatrist were acceptable. The order for the examination provided that the grievor be entitled to have his own psychiatrist and/or his legal counsel present during the examination.

AWARD: The grievance fails. The evidence indicates that the grievor was insubordinate and verbally abusive of his supervisor. His conduct warrants dicipline. The effect of the grievor's mental condition was not such as to undermine his capacity to understand the full significance of his actions. A change in his medication prior to the culminating incident cannot account for the entire course of conduct. A prior suspension, disciplinary meetings, and verbal warnings had not served to correct the grievor's conduct. There was no evidence of an apology being tendered. The employment relationship has been relatively short-term. The Employee Assistance Program available to employees is directed to the problem of absenteeism, and that is not the issue. The evidence indicates that the grievor has been and will continue to be unable to get along with his supervisor. A continued employment relationship is untenable.

DISSENT: (Blanchard) no written dissent provided

DECISION: 91-029

Dartmouth General Hospital AND Canadian Brotherhood of Railway, Transport & General Workers, Local 606

Slone, Eric K. - Arbitrator

Gordon Forsyth, for the Union
Kenneth Fowlie, for the Employer

March 26, 1991

ISSUES: Statutory holidays 8:3100; Past practice 3:4430; Interpretation 4:2000, 4:2100 - Intention of the parties 4:2100; Evidence - Types of evidence - Extrinsic evidence 3:4400 - Past practice 3:4430.

CIRCUMSTANCES: The grievors work twelve hour shifts and are governed by a separate Memorandum to the Collective Agreement. The Employer changed its method of calculation for hours and pay on statutory holidays. The Union argued that the method used before the change should be reverted to on the basis of past practice.

AWARD: The grievance fails. The evidence with regard to past practice is not reliable. The collective agreement includes clauses with respect to hours and pay; these should not be confused. Time worked in a pay period in excess of 75 hours is to be accumulated and taken as a day off with pay. Pay is to be calculated at specific rates. The Employer's method of calculation is approved as it does not bring the provisions of the collective agreement into conflict with each other.

DECISION: 91-030

Halifax (City) AND International Assn. of Firefighters, Local 268

Outhouse, Bruce - Arbitrator

Kim Turner, for the Union
Gerald Goneau, for the Employer

April 4, 1991

ISSUES: Skill and ability 6:3000 - Arbitral review 6:3100 - Senior employee if relatively equal 6:3220; Skill and ability 6:3000 - Criteria of ability and qualifications - Aptitude 6:3330; Skill and ability 6:3000 - Criteria of ability and qualifications - Examinations and tests 6:3340; Skill and ability 6:3000 - Criteria of ability and qualifications - Requirements of the job 6:3100; Interpretation 4:2000, 4:2100 - Words and phrases - Skill and ability - Qualifications 6:3000; Promotion, demotion, and transfer - Seniority 6:2000, 6:2100; Seniority 6:0000 - Applications 6:2000 - Promotion, demotion, and transfer 6:2000, 6:2100.

CIRCUMSTANCES: The Union seeks to have the Employer's 1989 promotion routine set aside. The routine determines which firefighters are eligible for promotion to the position of Lieutenant as openings arise, and is held every two years. Since the 1989 routine, 8 promotions have occurred. Each grievor is senior to some of the promoted personnel. The 1989 promotion routine considered three weighted factors: knowledge 40%, abilities 40% and personal suitability 20%. The candidates underwent written and verbal tests, and an interview. The final scores of the candidates were carried to two decimal places. There was a very narrow point spread for most of the 28 candidates. The Union argues that the 1989 promotion routine violated the collective agreement, which calls for consideration of factors of skill, ability and efficiency. It further states that many of the questions asked, particularly with respect to the personal suitability category, were not relevant to the job. It submits that the assessment and scoring were not consistent, and that the scores are not a reliable measure of skill, ability and efficiency. The Union claims that there was too much reliance on the oral interviews, again with reference to the personal suitability component of the score. Finally, the Union argues that the Employer's insistence on absolute rather than relative equality of scores before allowing seniority to be a factor is a failure to properly interpret the collective agreement. The Employer's position is that the promotion routine was conducted properly. Skill, ability, and efficiency were measured through the evaluation of knowledge, ability and personal suitability. Unless it acted in bad faith, arbitrarily or unreasonably, it submits that the Arbitrator cannot intervene. It argues that using relative equality as the factor for bringing in considerations of seniority would constitute an amendment of the collective agreement.

AWARD: The grievance succeeds. The 1989 promotion routine is declared invalid and all promotions conditional thereon are to be set aside. It is generally accepted that the word

equal means relatively equal when used to describe skill and ability. The collective agreement cannot be read as requiring absolute equality. The Employer relied far too much on the assessment and scores, which were very close, and allowed for no margin of error. Further, the promotion routine did not conform to the criteria of skill, ability and efficiency. The Arbitrator expressed reservations about the use of the personal suitability criteria, and the extremely subjective way in which they were assessed. He indicated that the criteria should be disregarded. Criteria of appearance and deportment have little to do with the ability to do the job in question. The evaluation of initiative, dependability and attitude were made without reference to the candidate's work histories. Improper consderation was given to experience with community involvement, which is wholly irrelevant.

SEE ALSO: 91-030.A

DECISION: 91-030.A

Halifax (City) AND International Assn. of Firefighters, Local 268

Outhouse, Bruce - Arbitrator

Kim Turner, for the Union
Gerald Goneau, for the Employer

May 7, 1991

ISSUES: Skill and ability 6:3000 - Criteria of ability and qualifications 6:3300 - Requirements of the job 6:3100.

CIRCUMSTANCES: The parties were unable to resolve various difficulties arising out of a prior arbitration award, and sought an additional hearing in an attempt to deal with these issues.

AWARD: Most of the issues fall outside of the limits of the jurisdiction retained by the Arbitrator to clarify his original award. The arbitrator directs that those persons effectively demoted as a result of the earlier award should not be given direct credit or preferential treatment on account of experience gained.

SEE ALSO: 91-030

DECISION: 91-031

Richmond District School Board AND Nova Scotia Teachers Union

Veniot, Milton J. - Arbitrator

George Mitchell, for the Union
Arthur D.W. Pickup, for the Employer

April 5, 1991

ISSUES: Interpretation 4:2000, 4:2100, 4:2300 - Aids to interpretation 4:2200; Interpretation 4:2000, 4:2100, 4:2300 - Canons of construction 4:2100; Past practice 3:4430.

CIRCUMSTANCES: A provision in a collective agreement was imposed on the parties by an arbitration board under the Teachers' Collective Bargaining Act. The clause was meant to cover the continuing education and professional development of teachers. The grievors applied to the Committee set up to administer the Teachers' Education Fund for funding to attend conferences. One of the grievors also applied separately to the School Board for time off to attend the conference in question. In both cases, partial funding was approved by the Committee on condition that the Board approved attendance and funding for substitutes. In both cases, the Board refused permission to attend the conferences. The Union grieves this as a breach of the collective agreement. The Employer argues that the Arbitrator has no jurisdiction to hear these grievances, as the complaints are against the Committee, which was not a party to the collective agreement. Further, the Employer argues that the imposed provisions include a parallel arbitration process. The Union argues that the Committee had approved attendance through granting partial funding, and that it is the Employer which denied the conference grant.

AWARD: The grievances fail. The imposed provisions do not provide for a separate arbitration process, but rather a means of breaking a deadlock on the Committee, which has equal representation from teachers and the School Board. The creation of a parallel arbitration system would be an anomalous result. The procedure set out in the contract was not followed. The Committee has the right to approve attendance; once it does so, the Board is bound to contribute funds if they are available. The Committee itself does not have the authority to expend the funds; it "administers" the Teachers' Education Fund. In these cases, because the Committee did not approve attendance at these conferences, the Board was not consequently bound to contribute. There is no basis for the Committee to delegate its authority to the Board, and the Board cannot exercise authority which properly belongs to the Committee.

DECISION: 91-032

Halifax-Dartmouth Industries Ltd. AND Industrial Union of Marine & Shipbuilding Workers of Canada, Local 1

Kydd, William H. - Arbitrator

Don Taylor, for the Union
Peter McLellan, for the Employer

March 20, 1991

ISSUES: Wages 8:1000.

CIRCUMSTANCES: Three grievances claim premiums for performing "dirty work". The premium is paid for work which is exceptionally dirty in nature. The working conditions and nature of each of the three tasks giving rise to a grievance were reviewed in some detail.

AWARD: The first grievance succeeds. The second grievance succeeds in part; if the parties are unable to agree on the amount of time the work characterized by the Arbitrator as exceptionally dirty took to perform, he retains jurisdiction to settle the matter. The third grievance fails as the work in question was performed under messy conditions rather than being exceptionally dirty in character.

DECISION: 91-033

Oak Electric Inc. AND International Brotherhood of Electrical Workers, Local 625

Mont, Stephen K. - Arbitrator

April 8, 1991

ISSUES: Consent award.

CIRCUMSTANCES: The Employer admits its liability for not remitting benefits as required under the Collective Agreement. The amounts owed are set out, and additional money owed as interest on pension monies and in payment of the Union's legal fees are included.

AWARD: A consent order is issued. If the Employer fails to pay, the Union may proceed to have the order filed and enforced by the Nova Scotia Supreme Court.

DECISION: 91-034

Community Housing for Emotionally Handicapped AND Canadian Brotherhood of Railway, Transport & General Workers, Local 620C

MacDonald, David J. - Arbitrator

Victor Tomiczek, for the Union
Glenn Gouthro, for the Employer

March 30, 1991

ISSUES: Seniority 6:0000 - Abrogation of right 7:7300; Seniority 6:0000 - Loss of seniority 6:1200, 7:3110, 7:3114 - Discharge distinguished 7:7300; Seniority 6:0000 - Termination of seniority 6:1200; Illness or disability - Effect on employee - Absence from work 7:3110; Discipline and discharge - Grounds for - Absence from work - Innocent distinguished 7:3200; Innocent absenteeism 7:3210.

CIRCUMSTANCES: The grievor was dismissed and seeks reinstatement. The grievor had been absent from work for a year at the time of the discharge, on a long-term disability leave. The leave arose from stress the grievor was under from the terminal illness and death of her husband. The collective agreement provides for a loss of seniority after an employee has not performed any work for one year.

AWARD: The grievance succeeds. A loss of seniority does not automatically require discharge. The Arbitrator finds that despite the loss of seniority, the employee is still recognized as having completed the probationary period. The grievor has the protection of the just cause provision relating to discharge. No just cause was shown. As the agreement provides that certain absences of up to one month are considered as time worked, the grievor should have received the benefit of this additional month before losing seniority. The grievor is entitled to an additional period of one month; if she does not return to work before the end of this time, she will lose all seniority and will hold the status of a bargaining unit employee without seniority who has completed the probationary period; finally, the grievor is to be compensated for any loss of benefits or contributions to which she would otherwise have been entitled.

DECISION: 91-035

Joneljim Concrete Construction Ltd. AND United Brotherhood of Carpenters & Joiners of America, Local 1588

MacDonald, David J. - Arbitrator

Ray Larkin, for the Union
Greg MacLeod, for the Employer

March 31,1991

ISSUES: Management rights 5:0000.

CIRCUMSTANCES: All but one carpenters were laid off at a job site. The second-last carpenter laid off was the job steward. Later, the employer had occasional need of additional carpenters. The Employer transferred in its own carpenters from other jobs rather than re-hiring the job steward. The Union argues that the job steward should have been re-hired as second carpenter on each occasion when the Employer found it needed more than one carpenter, and claims compensation from the Employer for those times when a second carpenter was hired. The Employer argues that the transfer clause of the appendix to the agreement allows it to hire its own carpenters on a 3-3-2 ratio to Union hiring hall carpenters. The Employer argues that having once hired a job steward, after he was properly laid off, there was no obligation to re-hire him as second carpenter.

AWARD: The grievance succeeds in part. The collective agreement is modified by the Trade Appendix as the exception created for the provisions of the Appendix is mandatory. The Employer can hire in the 3-3-2 ratio. However, there is nothing in the transfer clause to indicate that it is a one-time hiring ratio. The job steward can be properly laid off as fourth last carpenter, but must be re-hired when a fourth carpenter is needed. The job steward is awarded compensation for the hours he could have worked if he had been re-hired as fourth carpenter on the site.

DECISION: 91-036

Lunenburg County District School Board AND Canadian Union of Public Employees, Local 1441

Scaravelli, N.M. - Arbitrator

Alex Somerville, for the Union
Donald H. MacDougall, for the Employer

April 8, 1991

ISSUES: Work assignment 5:1000 - Bargaining unit work 5:1200.

CIRCUMSTANCES: The grievance relates to the use of mini-buses to transport students to and from activities. The Union acknowledges that where trips are funded by the School Board, its members drive the students in buses. However, when the students fund the trips, depending on the number of students involved, the mini-buses may be used, and in those cases, the bargaining unit members do not perform the work. The Union argues that the Employer owns or controls the mini-buses, and that its members should have the work. The Employer argues that the mini-buses are owned by school societies, and its guidelines for their use were established for safety purposes.

AWARD: The grievance fails. The mini-buses are not owned by the Employer. Guidelines have been issued for the transport of students involved in student activities, and the mini-bus guidelines apply in that regard. Neither the student bodies of the schools concerned nor the school societies are parties to the collective agreement between the Union and the Employer. The Arbitrator does not have jurisdiction to order them to use members of the bargaining unit as drivers. The driving of the mini-buses is not bargaining unit work. The collective agreement has not been violated

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DECISION: 91-037

Airport Transfer Ltd. AND Airport Transfer Drivers Assn.

MacLellan, J.A. - Chair; Durnford, Eric; Stockton, Ron

Michael Currie, for the Union
John Plowman, for the Employer

April 15, 1991

ISSUES: Time-limits - Mandatory or directory 2:3128; Time-limits - Relief against non-compliance 2:3140.

CIRCUMSTANCES: The grievance concerned a disciplinary matter. At the beginning of the hearing, the Employer raised a preliminary issue with regard to timeliness, alledging that time-limits set by the collective agreement had not been met. The collective agreement states that failure to comply with the time-limits constitutes abandonment of the grievance.

AWARD: The grievance fails. The Board has no powers to relieve against the operation of mandatory time-limits set by the collective agreement. The parties had agreed to extend one time-limit, but the grievor failed to meet that extended deadline. As a result, the grievance is untimely, and the Board has no jurisdiction to consider the merits of the grievance.

DECISION: 91-038

Halifax (City) AND International Assn. of Firefighters, Local 268

Outhouse, Bruce - Arbitrator

Ronald Pink, for the Union
Mary Ellen Donovan, for the Employer

April 15, 1991

ISSUES: Settlement 2:3230.

CIRCUMSTANCES: The grievance was filed over the Employer's consolidation of three administrative positions into one. One of the three, the position of Quartermaster, is referred to in the collective agreement, and is one of the few positions in the bargaining unit that an injured or disabled firefighter may perform. The consolidated position was rated at the rank of Captain, which firefighters were not eligible to apply for.

AWARD: The grievance was settled at the hearing. A consent order was issued indicating the basis of settlement. The consolidation of the positions would proceed, but the position would be posted and filled by an emloyee below the rank of lieutenant. The Arbitrator retained jurisdiction to deal with any matters arising from the implementation of the consent order.

DECISION: 91-039

Pioneer Coal Ltd. AND United Mine Workers of America, District 26

MacLellan, J.A. - Arbitrator

Don MacRae, for the Union
John Plowman, for the Employer

April 17, 1991

ISSUES: Skill and ability 6:3000, Trial, training and familiarization periods 6:3230; Recall 6:2354; Seniority - Applications - Recall 6:2354.

CIRCUMSTANCES: The grievor was placed on worker's compensation following a back injury. When his injury had healed, he was not called back to work because the employer claimed there was no work available. The grievor claimed that suitable work was available and that the employer did not rehire him because he was president of the union local. The grievor also argued that because comments he made which appeared in a published article were critical of the employer, the employer refused to rehire him. The employer argued it did not recall employees to work on a part-time basis when full-time employees were able to work overtime as requested.

AWARD: The grievance fails. The grievor failed to show that the employer had discriminated against him because of union activity. There was nothing discriminatory in the employer's decision to recall employees with less seniority than the grievor because the recalled employees had greater skill and ability. Nothing in the agreement requires the employer to provide a training or upgrading period.

DECISION: 91-040

Halifax (City) AND Canadian Union of Public Employees, Local 143

Outhouse, Bruce - Arbitrator

Turner, Kim, for the Union
Donovan, Mary Ellen, for the Employer

April 18, 1991

ISSUES: Overtime - Compulsory 5:3210, Voluntary 5:3210, Refusal to work 7:3632; Interpretation - Intention of the parties 4:2100.

CIRCUMSTANCES: The grievor was employed as a computer operator. The union argued the grievor should not be required to work mandatory standby and overtime because the position was not designated for mandatory overtime according to the agreement. The union argues the agreement only allowed mandatory overtime to be scheduled for positions where such overtime existed prior to January 1, 1988. Because the grievor had not worked any overtime prior to that date, the employer was not entitled to assign him mandatory overtime. The employer argued that terms in the agreement permitted it to schedule and assign mandatory overtime and that language in the job posting indicated overtime was mandatory.

AWARD: The grievance succeeds. Based on the agreement, the employer's ability to schedule overtime is limited by specific conditions. Language in the grievor's pre-1988 job posting was insufficient to justify a finding that the grievor could be scheduled mandatory overtime. Because the employer did not schedule mandatory overtime prior to January 1, 1988 for the grievor's job position and classification, the grievor cannot be assigned mandatory overtime. As remedy, the employer will cease requiring the grievor to work standby and mandatory overtime from a date specified in the award

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DECISION: 91-041

Halifax Heating & Air Conditioning Ltd. AND United Assn. of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 244

Outhouse, Bruce - Arbitrator

Gordon Forsyth, for the Union
Tim Donovan, for the Employer

April 23, 1991

ISSUES: Discipline and discharge - Grounds for - Refusal to obey instructions 7:3610, 7:3612, Union officials - Conducting union business 7:3623; Disciplinary penalties - Mitigating factors - Refusal to obey instructions - Union officials 7:3623; Remedies - Types of remedy - Reinstatement 2:1470; Incentive rates - Remedies 2:1422.

CIRCUMSTANCES: The arbitration involved three grievances stemming from working conditions on a temporary assignment at a tire manufacturing plant. The employer dismissed a shop steward for refusing to follow terms in the agreement for settling job site disputes. The grievor claimed reinstatement with compensation for all wages lost from the date of his termination. In addition, the union's grievance claimed dirt pay (i.e. compensation for arduous or hazardous work) and compensation for hours worked in excess of 40 hours per week.

AWARD: The grievances succeed in part. The claim for dirt pay is allowed from the date the grievors began working at the site, since both parties agreed working condition warranted the incentive pay. Jurisdiction is retained to fix the amount of compensation if the parties cannot agree. The union's overtime claim is dismissed because no adequate records of such claimed overtime were presented. The dismissed grievor was guilty of insubordination by refusing to follow instructions. In the construction industry, a reduced standard of just cause for termination exists. Refusal to follow instructions constitutes misconduct serious enough for dismissal. However, by terms in the agreement, the employer is required to discuss any termination of a shop steward with the union's business manager. Failing this requirement, the grievor's discharge was invalid. Compensation for lost wages and benefits shall be paid according to terms of the award; jurisdiction is retained to deal with the amount of compensation if the parties cannot agree.

DECISION: 91-042

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

MacDougall, R. Lorne - Arbitrator

Raymond Larkin, for the Union
Marian Tyson, for the Employer

April 23, 1991

ISSUES: Leave of absence 7:3120; Time-limits - Mandatory or directory 2:3128; Evidence - Burden of proof 3:2400.

CIRCUMSTANCES: The grievor's request for a one-year leave of absence was refused. After his grievance on the denial of leave was commenced, he submitted a conditional resignation which stated that if his grievance were successful, the resignation would be withdrawn. The employer responded by acknowledging the grievor's formal resignation. On the day prior to the arbitration hearing, the employer objected to the timeliness of the grievance, claiming it was initiated after the time limit set in the agreement. The union argued the principle of promissory estoppel prevented the employer from relying on the technical expiration of time limits. The union claimed the employer acted in bad faith by denying the leave application and that because the employer relied on justification for its denial, the onus of proof shifted to the employer. The employer claimed it did not act unreasonably in denying the grievor's leave application.

AWARD: The grievance succeeds. In light of recommendations in the supervisor's report, the request for leave was improperly denied. There was no evidence that granting the leave would disrupt the employer's operations. The employer's objection to the timeliness of the grievance fails because the grievance was commenced within time limits set in the grievance. The grievor shall be permitted to return to work after a reasonable grace period. Jurisdiction is retained in the event the parties are unable to agree on the implementation of this award.

DECISION: 91-043

Halifax Dartmouth Industries Ltd. AND Industrial Union of Marine & Shipbuilding Workers of Canada, Local 1

Kydd, William H. - Arbitrator

Don Taylor, for the Union
Malcolm Boyle, for the Employer

April 24, 1991

ISSUES: Work assignment 5:1000, Contracting out - Employees outside unit 5:1400

CIRCUMSTANCES: The grievors were warehousemen who alleged the employer violated the agreement by assigning to other employees their duties of issuing materials. They further alleged this practice denied warehousemen the opportunity to work overtime. The employer claimed that because all warehousemen with seniority were employed, the agreement gave it the authority to assign warehousemen responsibilities to employees in other classifications.

AWARD: The grievance fails. The employer has followed an established practice by assigning warehousemen duties to other workers. Therefore there has been no violation of the agreement.

DECISION: 91-044

Northside-Victoria School Board AND Canadian Union of Public Employees, Local 981

MacDonald, David J. - Chair; McDougall, Donald; Pickford, Thomas

Gerald Yetman, for the Union
Eric Durnford, for the Employer

April 24, 1991

ISSUES: Work assignment 5:1000, Bargaining unit work 5:1200, Contracting out - Employees outside unit 5:1400; Interpretation - Words and phrases - Bargaining unit work 5:1200.

CIRCUMSTANCES: As part of its forestry training program, the employer assigned responsibility for driving the forestry bus to the program instructors. The union's grievance alleged this work assignment violated the agreement because operating the bus constituted

bargaining unit work being done by non-union members. The employer argued that operating the bus could not be considered the same as driving a school bus because the forestry bus was integral to the operation of the program.

AWARD: The grievance fails. The work of driving the forestry bus is distinct and separate from the normal duties of driving a school bus. Furthermore, the forestry program was not in existence when terms in the contract dealing with job security were agreed to. Therefore the forestry bus duties are not covered by the specific provisions dealing with work assignment.

DECISION: 91-045

Hillcrest Manors Ltd. AND Canadian Brotherhood of Railway, Transport & General Workers Union, Local 619

MacLellan, J.A. - Arbitrator

Ted Powell, for the Union
John Rafferty, for the Employer

April 30, 1991

ISSUES: Discipline and discharge - Grounds for - Refusal to obey instructions 7:3610, 7:3612, Work performance - Carelessness 7:3520; Disciplinary penalties - Reasonableness 7:4300.

CIRCUMSTANCES: A personal care worker in a nursing home grieved her suspension for five alleged rule violations which occurred in the same day. She asked, as remedy, that notice of the suspension be removed from her personnel file and that she be compensated for all lost wages and benefits resulting from the suspension.

AWARD: The grievance fails. The grievor failed to follow standard procedures which resulted in serious errors. The employer therefore had just cause to discipline the grievor. Based on the severity of the grievor's errors, and the fact that the employer had given two previous written warnings regarding her unsatisfactory work performance, the suspension was reasonable.

DECISION: 91-046

F.A. Tucker (Atlantic) Ltd. AND International Brotherhood of Electrical Workers, Local 1928

Outhouse, Bruce - Arbitrator

Bruce Matheson, for the Union
David Byrne, for the Employer

April 30, 1991

ISSUES: Travel allowance 8:3700.

CIRCUMSTANCES: The union claimed the employer violated the agreement when it classified the grievor as a utilityman, instead of as a groundsman. By this lesser classification, the grievor was denied room and board allowance while working on a job site more than fifty kilometers from his home. The union grieved this decision on two grounds: first, that another employee assigned the same basic duties as the grievor was receiving the allowance; and second, that the grievor had received the allowance when working on a previous distant job site. The employer maintained it had properly classified the grievor as an unskilled worker and that by the agreement he was not entitled to the allowance.

AWARD: The grievance fails. The employer did pay another employee doing similar work because that employee had been classified upward. The grievor was doing the work of a utilityman and was properly classified.

DECISION: 91-047

Maritime Beverages Ltd. AND International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers, Local 927

DeMont, Eric - Chair; Larkin, Raymond; McDougall, Donald

Susan Coen, for the Union
Eric Durnford, for the Employer

May 1, 1991

ISSUES: Management rights 4:2310, 5:000; Estoppel 2:2210.

CIRCUMSTANCES: The employer is a soft drink manufacturer and distributor. The beverages are delivered by drivers designated as route merchandisers who are assigned

specific delivery routes on a permanent basis. Spare drivers selected their delivery routes on a daily basis according to seniority. The employer implemented a new delivery system where the spare drivers were assigned routes according to the employer's requirements. The union grieved the change, arguing it violated the agreement by unilaterally eliminating the spare drivers' seniority system. The union further claimed the employer was estopped from making the change because it had previously stated it would not change the dispatching system without the union's approval. The employer maintained that management rights in the agreement give it the authority to change the delivery system.

AWARD: The grievance fails. Management rights terms in the agreement give the employer the right to direct the work force and to determine the method and means of product delivery. The necessary conditions to support the union's claim of promissory estoppel did not exist.

DECISION: 91-048

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Outhouse, Bruce - Arbitrator

Ronald Pink, for the Union
Alison Scott, for the Employer

March 4, 1991

ISSUES: Bargaining unit - Definition 5:1100; Bargaining unit - Work assignment 5:1200; Work assignment 5:1000 - Bargaining unit work 5:1200.

CIRCUMSTANCES: A policy grievance was filed by the Union over the posting of four new positions for teachers in the Comprehensive Basic Skills program with the Nova Scotia Teachers Union (NSTU) rather than with the grievor Union (NSGEU). Historically, the NSTU has represented the teachers and instructors in the regional vocational schools operated by the Employer, and the NSGEU has represented the teachers and instructors in module programs offered by the Employer. Up to now Comprehensive Basic Skills teachers have been represented by NSGEU. The Union argues that teaching of Comprehensive Basic Skills programs is bargaining unit work, and should not have been given to the NSTU. The Employer argues that NSTU has exclusive jurisdiction to represent teachers in the institutions in question. The Employer also argued that it can transfer work from one bargaining unit to another.

AWARD: The grievance fails. The burden is on the Union to establish its jurisdiction over these positions, and it has failed to do so. The bargaining unit is defined in terms of

employees or positions, not on the basis of work jurisdiction. The Employer does not have the right to take work away from one bargaining unit and give it to another, but the positions in question here were never in the Union. There is nothing which obliges the Employer to put these positions in the Union's bargaining unit. The Employer acted in good faith, following its policy of applying the collective agreement which covered the teaching staff at the institutions where the positions were placed.

DECISION: 91-049

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Cotter, W. Brent - Arbitrator

Kim Turner, for the Union
William Wilson, for the Employer

March 22, 1991

ISSUES: Skill and ability 6:3000 - Arbitral review 6:3100 - Senior employee if relatively equal 6:3220, - Criteria of ability and qualifications 6:3300.

CIRCUMSTANCES: The grievor, the senior employee of three applicants, was not awarded a position for which he had applied. The Union argues that the interview process was flawed in that the interview committee used inappropriate criteria, that the criteria were improperly treated as being of equal value, and that no standard was established in relation to the questions asked and answers expected by the interview committee. The Union asks that the competition be set aside, that another competition be held, and that the successful applicant's experience gained since the previous competition not be taken into account in a new competition. The Employer moved that the grievance be dismissed as the grievor failed to establish a prima facie case that he was qualified for the position. The Employer further argues that the grievor was not qualified, and that the interview process was not flawed.

AWARD: The preliminary motion is dismissed. The grievor established that he was a qualified candidate with appropriate educational background and experience. The grievance is fails. Although the arbitrator is of the opinion that the interview process was less than perfect, it did not result in a disadvantage to the grievor. It is not enough to demonstrate flaws, it must also be shown that the grievor was disadvantaged by the flawed process. Where the Employer can show that it was not unfair, it is inappropriate for the arbitrator to use irregularities to set aside the Employer's decision. Re-weighting the criteria would not have helped the grievor obtain the position. The criteria were largely fair, setting aside one criterion used by one member of the interview panel. The lack of standards reflects the different backgrounds of the members of the interview committee, and is not seen to be

unreasonable. The sum of the irregularities is insufficient to set aside the Employer's decision.

DECISION: 91-050

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Outhouse, Bruce - Arbitrator

Ron Pink, for the Union
Jon Davies, for the Employer

March 25, 1991

ISSUES: Discipline and discharge - Just cause 7:1200.

CIRCUMSTANCES: Pursuant to a settlement in an earlier grievance, the grievor enrolled in several courses which the Employer considered would upgrade his skills as a teacher. As a result of his failure to complete these courses to the Employer's satisfaction, he was discharged for incompetence as a teacher. The grievor was not warned that failure to successfully complete all of the courses would constitute grounds for dismissal. The grievor has never been evaluated on his teaching performance. The Union argues that the discharge violates the collective agreement, as just cause has not been shown.

AWARD: The grievance succeeds. The Employer has failed to prove its argument that the grievor is incompetent. The parties did not see fit to require in the terms of settlement that the grievor pass the course of upgrading; there is nothing in the evidence to suggest that the grievor wilfully refused or neglected to pursue the courses of study. No meaningful comparison was established between the courses the grievor was required to take and the material he normally teaches. No proper evaluation of the grievor's teaching skills was undertaken. The Employer is directed to reinstate the grievor to employement with full compensation. The Employer retains the right to require the grievor to undergo further courses of upgrading, at the Employer's expense, before re-assigning him to the classroom.

DECISION: 91-051

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Slone, Eric K. - Arbitrator

Raymond Larkin, for the Union
Jonathan Davies, for the Employer

April 22, 1991

ISSUES: Interpretation 4:2000, 4:2100 - Aids to interpretation 4:2200 - Statutes 4:2230; Interpretation 4:2000, 4:2100 - Statutes - As aid to interpretation 2:2100, 4:2230; Collective agreement - Amendments 4:1300; Collective agreement - Binding effect - Determination of 4:0000.

CIRCUMSTANCES: The Employer and the Union had participated in a pay equity adjustment process as directed by the Pay Equity Act. A Joint Committee had made recommendations for adjusting salary scales, and these recommendations were scheduled for implementation. After making its recommendations about salary adjustments, the Joint Committee learned that the grievors worked a work week of a different length than the other workers who were considered with them in the pay equity process. The Joint Committee purported to make a second agreement with respect to the salary adjustment for the grievors. The grievors claim the Employer has failed to pay to them monies owing under the first agreement. The Employer argues that the Arbitrator is without jurisdiction to hear the case as it arises out of the operation of the Pay Equity Act. The Union argues that the first agreement amended the collective agreement, and that once completed, the pay equity process cannot be revisited to make adjustments to the recommendations. The Union representative who signed the second agreement was without authority to make such an agreement, and the Employer's representative was aware of this.

AWARD: The grievance succeeds. The first agreement and implementation schedule resulting from the pay equity process constitute amendments to the collective agreement. The Arbitrator has jurisdiction to resolve disputes arising from differences in opinion as to the interpretation of the collective agreement. The Joint Committee believed that there would be a second agreement under s.14 of the Pay Equity Act when it made the second agreement with respect to the salary adjustments to be paid to the grievors. The second agreement did nothing to retract or modify the collective agreement as amended by the first agreement and the implementation schedule. The Union is not barred from seeking implementation of the collective agreement as amended. The Employer is to pay the grievors salary adjustments retroactive to September 1, 1990, and is to continue to pay them until such time as the agreement is further amended.

DECISION: 91-052

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Slone, Eric K. - Arbitrator

Kim Turner, for the Union
Jonathan Davies, for the Employer

February 1, 1991

ISSUES: Company rules 4:1500 - Reasonableness 4:2300; Management rights 4:2300.

CIRCUMSTANCES: The Employer has a policy which sets out the amount that may be claimed by employees for meals when travelling on business. The Grievors submitted claims for amounts in excess of the allowance, and seek reimbursement for the full amount they spent. The Employer's policy allows reimbursement in "unusual" circumstances, but argues that the onus is on the employees to justify the additional expense. The grievors' supervisor disallowed the claims for additional amounts without seeking any explanation of why they were incurred. The Union argues the Employer is obliged to reimburse all reasonable expenses, and claims the amounts owed. The Employer objects to the grievance because the Union did not cite the section of the collective agreement which was breached.

AWARD: The grievance succeeds. The Employer was not prejudiced in its case by the lack of a particular section of the collective agreement being cited in the grievance documents. While the Employer has the right to establish policies to administer the provisions of the collective agreement, these policies are subordinate to it. The Employer has a duty to ensure harmonious application of the policy, and evidence indicated that several departments apply the policy differently. The Employer cannot refuse to pay all additional amounts over the allowance without exercising its discretion as to whether the expense should be allowed as an "unusual" one. "Unusual" does not mean rare. The grievors' supervisor should have sought explanations; failure to do so was unreasonable. The Employer is directed to reconsider the grievors' claims, with the benefit, if required, of input from the grievors as to why the additional expenses were reasonably incurred. The amounts claimed are not awarded the grievors.

DECISION: 91-053

Otis Canada Inc. AND International Union of Elevator Constructors, Local 125

DeMont, Eric G. - Arbitrator

Raymond Larkin, for the Union
John W. Saunders, for the Employer

May 14, 1991

ISSUES: Estoppel 2:2200, 2:2210, 2:2220; Collective agreement - Matters arising outside of 2:1200 ; Remedies - Type of grievance - Work assignment outside unit 2:1424, 5:1500, Types of remedy - Compliance order 2:1450; Work assignment - Contracting out - Employees outside unit - Remedies 2:1424, 5:1500.

CIRCUMSTANCES: The employer manufactures and installs elevators and escalators. The union grievance alleged an escalator was installed as a pre-fabricated unit, in violation of work jurisdiction terms in the agreement. The union had offered to waive the work terms prohibiting installation of pre-assembled units in return for an hourly wage increase of .75/hour to all employees. The employer refused this offer but the wage proposal was accepted by a local competitor. The employer argued that because the union allowed the installation of a pre- assembled escalator elsewhere in the jurisdiction in return for the wage increase, it had repudiated the agreement. Therefore the union was estopped from relying on work jurisdiction terms. The union claimed as remedy for the alleged violation compensation for the value of the work lost, and an order directing the employer to comply with work jurisdiction terms in the agreement.

AWARD: The grievance succeeds. Estoppel can only be applied where the conduct giving rise to the estoppel has been carried on for an extended period. The union's decision to waive the work jurisdiction rule for a second company only occurred once. Neither can that decision be considered a violation of the agreement, since the second company was not a signatory to the collective agreement. As remedy, the employer shall pay the union compensation in trust, according to terms of the award. Further, the employer is ordered to comply with terms for the installation of the remaining escalator units on the construction site. Jurisdiction as to the amount of compensation is retained if the parties cannot agree.

DECISION: 91-054

Brookfield Foods AND Retail, Wholesale & Department Store Union, Local 1015

Outhouse, Bruce - Arbitrator

Raymond Larkin, for the Union
Malcolm MacLeod, for the Employer

May 27, 1991

ISSUES: Interpretation - Expressio unius, exclusio alterius 4:2100, Intention of the parties 4:2100; Estoppel 2:2200, 2:2210; Extrinsic evidence 3:4400; Evidence - Types of evidence - Extrinsic evidence 3:4400, Procedure for receiving 3:4410; Remedies - Types of remedy - Damages - Interest 2:1414.

CIRCUMSTANCES: The grievor worked in a cheese production unit of a dairy. The present grievance arose when a new collective agreement changed the rate of pay for the grievor's Sunday work. He claimed he was entitled to double time for Sunday work. The employer argued that new terms in the agreement classified Sunday as a normal working day for the grievor. It further claimed the union was estopped from asserting the grievor's Sunday pay claim. The employer relied on evidence of negotiating history to support its claim of estoppel. The union maintained the evidence of negotiating history was insufficient to establish an estoppel.

AWARD: The grievance succeeds. Clear language in the agreement entitles all employees working on a Sunday (except for two specific classes which did not include the grievor) to double pay for time worked. It is an established principle of contract interpretation that where the parties specify certain exceptions to terms of general application, no other exception are to be implied. Further, there is nothing in the agreement to support the employer's claim that terms dealing with Sunday pay are superseded by earlier provisions in the agreement. Since there is no ambiguity in contract language dealing with Sunday pay, the employer's claim for extrinsic evidence as an aid to construction fails. Neither can the argument for estoppel be allowed. The employer's subjective intent as to the meaning of its proposed contract language dealing with Sunday pay was never communicated to the union. Without that communication, the union's silence on the accepted terms does not amount to a representation upon which the employer's claim of detrimental reliance could be founded. The grievor is therefore to be compensated double time with interest for all Sunday work performed. Jurisdiction is retained should the parties disagree on the amount of compensation and interest.

DECISION: 91-055

Children's Aid Society of Cape Breton AND Canadian Union of Public Employees, Local 3010

North, Gregory I. - Arbitrator

N. Blaise MacDonald, for the Union
John MacPherson, for the Employer

May 29, 1991

ISSUES: Abandonment 2:3230; Time-limits - Mandatory or directory 2:3128; Procedure - Powers of board of arbitration - Relief against time limits 2:3140, Preliminary objections 3:2100.

CIRCUMSTANCES: The grievor, an unsuccessful candidate for a job competition, grieved the employer's decision. When the matter reached arbitration, the employer raised the preliminary objection that time limits in the agreement for the processing of grievances had not been adhered to by the union. The matter was therefore inarbitrable and should be dismissed. The union claimed that the employer was notified of its intention to proceed to arbitration within the time limits of the agreement's grievance procedure.

AWARD: The grievance is dismissed. Based on terms in the agreement, time limits dealing with selection of an arbitrator were mandatory, not directory in nature. Because an arbitrator was not selected within those specific time limits, the grievance must be deemed to be resolved and abandoned. The present arbitrator has no jurisdiction to deal with the matter on its merits.

DECISION: 91-056

Central Automatic Sprinkler Ltd. AND United Assn. of Journeymen & Apprentices of the Plumbing & Pipefitting Industry of the United States & Canada, Local 56

DeMont, Eric G. - Arbitrator

Gordon N. Forsyth, for the Union
Don Scott, for the Employer

July 2, 1991

ISSUES: Work assignment 5:1000 - Bargaining unit work 5:1200.

CIRCUMSTANCES: The Union alleges the Employer breached the collective agreement by hiring non-union employees to do work properly belonging to the bargaining unit. Evidence was given that these workers spent no more than 50% of their time painting, and performed bargaining unit work for the balance of the time.

AWARD: The grievance succeeds. Based on the evidence, there is no doubt that the employees did some bargaining unit work. The Union is awarded damages equivalent to the wages and benefits that would have been earned by union members for that proportion of the total number of hours worked by the employees which the Arbitrator feels were spent doing bargaining unit work.

DECISION: 91-057

Nova Scotia (Solicitor General) AND Police Assn. of Nova Scotia

Cromwell, T.A. - Chair; Stockton, R. A.; Durnford, E. B.

David Fisher, for the Union
Reinhold Endres, for the Employer

April 4, 1991

ISSUES: Interpretation 4:2000, 4:2100, 4:2300 - Intention of the parties 4:2100.

CIRCUMSTANCES: The grievance concerns the interpretation of the provision for calculation of retroactive pay for full-time employees on 12-hour shifts. The Union alleges the Employer has improperly calculated the pay for the retroactive period.

AWARD: The grievance fails. The intent of the parties in negotiating the contract was to move from an hourly basis for compensation to an annual salary. Workers on both 8 and 12-hour shifts now receive the same salary, and in addition the workers on 12-hour shifts receive overtime for hours worked in excess of 40 hours. However, for the retroactive period, workers on both 8 and 12-hour shifts receive the same compensation.

DISSENT: Stockton: The grievance should succeed. The Employer should pay retroactive pay on an hourly rate.

DECISION: 91-058

T.C.C. Bottling Ltd. AND Brewery and Soft Drink Workers, Local 361

Cromwell, T.A. - Arbitrator

Susan Coen, for the Union
Brian Johnston, for the Employer

May 30, 1991

ISSUES: Discipline and discharge - Grounds for - Theft 7:3310, 7:3312, 7:3314, Just cause 7:1200; Disciplinary penalty - Reasonableness 7:4300; Credibility 3:5100.

CIRCUMSTANCES: The grievor was discharged for two incidents of mishandling company funds. He admitted to one of the incidents. The issues to be determined were: 1) has the second alleged incident been proven; 2) was the grievor's discharge a just and reasonable penalty?

AWARD: The grievance fails. The grievor's decision to repay the first outstanding account was prompted by the company's firing of another employee who withheld funds. In the second incident, evidence showed the grievor mishandled funds when he received cash on account and failed to deposit it with the company until months later. His testimony conflicted with credible evidence to the contrary. The employer is entitled to a basic level of honesty and good faith from employees. The grievor lied and showed gross carelessness. His discharge was a just and reasonable penalty.

DECISION: 91-059

Halifax County-Bedford District School Board AND Union of School Board Employees

MacDougall, R. Lorne - Chair; Horne, Margaret; McDougall, Donald H.

Bruce W. Evans, for the Union
Eric B. Durnford, for the Employer

May 31, 1991

ISSUES: Bereavement leave - Duration 8:3530; Interpretation - Ambiguity 3:4400, 3:4410; Evidence - Burden of proof 3:2400, Standard of proof 3:2500, Types of evidence - Extrinsic evidence 3:4400.

CIRCUMSTANCES: The union grieved interpretation of terms in the agreement dealing with bereavement leave. The union claimed a proper interpretation allowed up to five days leave per bereavement. The employer argued that the correct interpretation permitted a total of five days leave per school year. Both parties agreed that contract terms on bereavement leave were ambiguous and that the issue of meaning was never raised during contract negotiations. The union argued that a liberal interpretation should be given since the fundamental purpose of bereavement leave justified a broad approach. If contract language is not clear, the union argued, then the benefit of any doubt should be resolved in favour of the employees. The employer argued that because leave is a negotiated benefit, the union has the burden of proving a breach in the agreement.

AWARD: The grievance fails. Ambiguous language in the agreement requires the use of extrinsic evidence. There was some acceptance of the employer's interpretation by members of the union. The burden of proof, then, is on the union that the agreement be interpreted as it argues. Based on extrinsic evidence, the union has failed to prove on a balance of probabilities that there was any agreement between the parties to the interpretation that it is asserting.

DECISION: 91-060

Town Daycare Centre AND Canadian Brotherhood of Railway, Transport & General Workers, Local 620B

O'Connell, Charles - Arbitrator

Victor Tomiczek, for the Union
Darlene McRury, for the Employer

June 6, 1991

ISSUES: Bargaining unit - Employees excluded 5:1120; Evidence - Exclusionary rules - Hearsay 3:4310; Promotion, demotion and transfer - Demotion or transfer - Non-disciplinary 7:3546, Bona fides 5:2300, Reasonableness 6:3100; Reasonableness - Demotion 6:3100; Fairness - Non-disciplinary demotion 7:3546; Good faith - Vacancies, transfers, promotion 5:2300.

CIRCUMSTANCES: The grievor was a worker's aide at the employer's day care centre. She argued that she was a member of the union and that the employer's decision to reduce her wages when she returned from maternity leave, on the grounds that she was excluded from the bargaining unit, was a violation of the collective agreement. The employer argued that the grievor was a casual employee hired from day to day and that her position was excluded from the union.

AWARD: The grievance succeeds. The grievor paid union dues for a period of time and received the same rate of pay, maternity leave and vacation pay as permanent employees. The employer never told the grievor that she was viewed as a casual employee. Her status, therefore, was not that of a casual or temporary employee. The grievor will be compensated for the period her salary was reduced according to terms in the award. Because the responsibility for collecting union dues rests with the union, the claim for union dues is dismissed. Jurisdiction ir retained should the parties be unable to agree on the amount of compensation owed to the grievor.

DECISION: 91-061

Cape Breton (Municipality of the County) AND Canadian Union of Public Employees, Local 1545

O'Connell, Charles - Chair; MacDonald, J. Michael

Raymond Larkin, for the Union
David Muise, for the Employer

June 6, 1991

ISSUES: Job classifications and descriptions - Creation or revision - Remedies 5:2440; Board of arbitration - Establishment 3:1100; Grievance - Settlement of grievance 2:3230.

CIRCUMSTANCES: The union filed three grievances regarding classification of its members. In the absence of the arbitration board's union nominee, both parties agreed to permit the remaining board members to proceed with the hearing.

AWARD: The parties agreed to a consent award which applied to three grievances. The positions will be reclassified to a higher wage level and the individual grievors will be compensated according to terms of the award.

DECISION: 91-062

Atlantic Wholesalers Ltd. (Halifax Branch) AND Bakery, Confectionery & Tobacco Workers International Union, Local 446

MacDougall, R. Lorne - Arbitrator

Rene Quigley, for the Union
Peter McLellan, for the Employer

May 19, 1991

ISSUES: Discipline and discharge - Grounds for 7:3000, - Absence from work - Failure to notify employer 7:3110; Disciplinary penalties 7:4000 - Culminating incident 7:4310; - Reasonableness 7:4300; - Disciplinary record 7:4310.

CIRCUMSTANCES: The grievor alleges that he was unjustly dismissed. The Employer argues that the grievor's past record of absenteeism and disregard for company policy in his failure to report in as unavailable for work constitute just cause. The grievor had received in the previous 12 month period two warnings about his conduct. The Union argues that the grievor had been injured at work, and that he cannot be discharged for the absence flowing from that injury. The Employer responds that the discharge is for the failure to report in.

AWARD: The grievance succeeds. A four month suspension is substituted as a penalty for the grievor's failure to report in. There was an attempt by the grievor and his physician to keep the Employer informed that the Grievor would be unavailable for work "till further notice".

DECISION: 91-063

M B & B Mechanical Services Ltd. AND United Assn. of Journeymen & Apprentices of the Plumbing, Steamfitting & Piping Industry of the United States & Canada, Local 682

Scaravelli, N.M. - Arbitrator

John C. MacPherson, for the Union
Brian Johnston, for the Employer

June 12, 1991

ISSUES: Work assignment - Bargaining unit work 5:1200, Contracting out 5:1300; Contracting out 5:1300; Collective agreement - Matters arising outside of 2:1200 .

CIRCUMSTANCES: The union claimed the employer violated terms in the agreement and its appendix when it subcontracted prefabrication work on steel pipe. At the beginning of arbitration, the employer raised several preliminary objections, including the claim that it was not operating as a construction contractor but as a supplier of goods and materials. It further claimed that the agreement to supply steel pipes was entered into with a joint venture consortium. The union argued that parties to a joint venture act as principal and agent for each other and therefore all parties to a joint venture are bound by the collective agreement.

AWARD: The grievance is dismissed. As a member of the joint venture, the employer was bound by the agreement. However, the joint venture was essentially responsible only for supplying materials. Because the employer was therefore not engaged in the construction industry, terms in the agreement dealing with subcontracting have no application.

DECISION: 91-064

Merit Mechanical Ltd. AND Sheet Metal Workers International Assn., Local 409

DeMont, Eric G. - Arbitrator

Gordon N. Forsyth, for the Union
David J. Thompson, for the Employer

June 20, 1991

ISSUES: Contracting out 5:1300, Remedies 2:1424; Work assignment - Contracting out 5:1300, Employees outside unit - Remedies 2:1424, 5:1500; Remedies - Type of grievance - Contracting out 2:1424, Types of remedy - Damages - Certainty of 2:1410.

CIRCUMSTANCES: The union alleged the employer used non-union employees on a contract project. Under terms in the agreement, it claimed jurisdiction over the manufacture, fabrication, assembling, adjusting and recondition of all sheet metal work. The union claimed damages for that portion of the work that was done by non-union employees. The employer argued that the union had not proven its case and that its estimates of lost union work were no more than guesses.

AWARD: The grievance succeeds. The burden is on the union to prove that some of the work on the project was done by non- union personnel and based on the evidence, the union has met that burden. The employer will compensate the union for the hours of work lost according to the terms of the award.

DECISION: 91-065

Glace Bay Community Hospital AND Nova Scotia Nurses Union

MacDonald, David J. - Chair; McDougall, Donald; Larkin, Raymond

Elizabeth Mullaly, for the Union
Eric Durnford, for the Employer

June 7, 1991

ISSUES: Illness or disability - Holiday pay - Entitlement 8:3123, Vacation entitlement 8:3210; Insurance and welfare plans - Entitlement to benefits 4:2100, Medical benefits and other benefits 8:3330; Pyramiding of benefits 8:3330; Interpretation - Words and Phrases - Day or working day 4:2100.

CIRCUMSTANCES: The grievor, a full-time nurse, was injured while on duty in 1987. Following her injury, she received Workers' Compensation benefits and disability payments from her employer. The employer's contribution ceased in the summer of 1989. The grievor alleges the employer violated the agreement when it ceased to compensate her with vacation, holiday and sick leave credits for the period from 1987 to 1989 when she was receiving the employer's disability payments.

AWARD: The grievance succeeds in part. The employer's disability payments are considered compensation paid to the grievor at the rate of 25 percent of her salary. Therefore, as long as the grievor was being paid the disability monies, she was earning vacation and holiday credits at the same rate of 25 percent. Once the grievor reached the maximum amount of accumulated sick leave allowed by the agreement, she could not earn any further sick leave. Jurisdiction is retained to deal with the calculation, or implementation, of this award.

DISSENT: (McDougall) The grievance should be dismissed, rather than be allowed in part. Terms in the agreement clearly state that vacation credits shall accumulate on the basis of time worked. Nurses receiving Workers' Compensation are off-duty employees who are not working. Similarly, holiday credits also accumulate on the basis of time worked. When nurses are on paid vacation or paid holiday, they are to receive credit for those days in calculating future vacation credits. But those days when nurses are receiving Workers' Compensation cannot be considered working days for the calculation of vacation and holiday. Furthermore, terms in the agreement dealing with Workers' Compensation do not provide that nurses are to accumulate sick leave credits while in receipt of that Compensation. Because such language is not found in the agreement, it must be inferred that the parties did not intend nurses receiving Workers' Compensation to continue accumulating sick leave credits.

DISSENT: (Larkin) Nurses on sick leave earn vacation and holiday credits at the same rate as nurses who are at work. The employer's sick leave payment is payment in relation to a day off work, not 25 percent of a day off work, as the chair has ruled. Nothing in the agreement allows the division or proration of vacation and holiday credits. To award such a division is inconsistent with the agreement. It is a duty of arbitration boards to reach an honest interpretation of the agreement, and not to impose a compromise on the parties which they did not reach for themselves.

DECISION: 91-066

Odyssey Cape Breton Tourist Attractions Ltd. - Dundee Resort AND Labourers International Union, Local 1115

MacDonald, David J. - Arbitrator

Gordon N. Forsyth, for the Union
Karin A. McKaskill, for the Employer

June 26, 1991

ISSUES: Work assignment 5:1000, Contracting out - Employees outside unit 5:1400, During lay-off 6:2354, Remedies 5:1500; Estoppel - Condonation 2:2220; Supervisors - Bargaining unit work 5:1400; Lay-off - Non-unit employees preforming work during 6:2354; Remedies - Type of grievance - Work assignment outside unit 5:1500 2:1424, Types of remedy - Damages - Measure 2:1410.

CIRCUMSTANCES: The union's grievance alleged that the golf course superintendent, a non- bargaining unit employee, did bargaining unit work, and that the employer retained summer students to do bargaining unit work while union members were laid off. As remedy, the union seeks damages for lost union dues and lost overtime for bargaining unit members. The grievance also alleged that the employer violated the agreement by paying staff bi-weekly instead of every week.

AWARD: The grievance succeeds in part. Sufficient bargaining unit work was done by one student after September 1990 to have kept one bargaining unit worker employed for a two week period. The employer shall therefore pay the employee with the greatest seniority all lost wages and benefits less deductions for a two week period in September 1990. The employer's decision to implement bi-weekly pay periods was a violation of the agreement; henceforth employees shall be paid weekly. As to the general employment of students, based on the evidence there was an acquiescence on the part of bargaining unit members to this fact, and this employment did not cause regular bargaining unit employees any loss of work. Nor did work by the golf course superintendent reach a level that violated terms in the agreement. In future, the employer shall refrain from any employment of students which leads to the cross-over of work activity into the jurisdiction of bargaining unit staff. Jurisdiction is retained to deal with the amount of compensation should the parties be unable to agree.

DECISION: 91-067

Shersmith Investment Ltd. (Keddy's Motor Inns) AND Hotel, Employees & Restaurant Employees International Union, Local 772

O'Connell, Charles - Arbitrator

Blaise MacDonald, for the Union
Murdock Moore, for the Employer

June 24, 1991

ISSUES: Lay-off - Bumping 6:2330, Seniority - Applied 6:2000, 6:2200; Seniority - Application - Bumping 6:2330, Lay-off 6:2000, 6:2200; Skill and ability 6:3000, Trial, training and familiarization periods 6:3230; Remedies - Type of grievance - Lay-off 2:1425, Bumping 6:2330.

CIRCUMSTANCES: The union grievance alleged that the employer violated the seniority provisions of the agreement by laying off 14 members in October 1990 without regard to their ability to fill other job functions in the motel. The union argued that seniority is motel-wide rather than limited to specific occupational classifications.

AWARD: The grievance succeeds. The October lay-offs were implemented without regard to the seniority provisions in the agreement. However, seniority rights are limited to specific occupational classifications in the agreement. Furthermore, employees invoking their seniority rights must possess the immediate ability to perform the job at the time it is claimed without the need for a training period. Jurisdiction is retained should the parties be unable to agree on the application of seniority provisions in the context of the October 1991 lay-offs.

DECISION: 91-068

Dartmouth (City) AND Nova Scotia Union of Public Employees, Unit 1

DeMont, Eric G. - Chair; D'Orsay, John; Durnford, Eric G.

Ron Stockton, for the Union
Michael Moreash, for the Employer

June 28, 1991

ISSUES: Strikes and lockouts 9:2100 - Unlawful strikes - Damages 2:1427, 9:2500; - Union liability 9:2430, 9:2434.

CIRCUMSTANCES: The Employer is seeking damages in connection with a work stoppage on July 4 and 5, 1989. The employees refused to go back to work after lunch as a result of their belief that the Employer was deliberately delaying its ratification of a new collective agreement. Union officials attended an informal meeting held before the refusal to go back to work, and advised the employees that a walkout was illegal. The employees returned to work the following afternoon after receiving a written assurance that the Employer would consider the contract at a meeting that evening.

AWARD: The grievance succeeds. The refusal to work constituted an illegal strike. The Board finds that the Union did not make prompt attempts to get the employees back to work, and finds that the Union is vicariously liable for damages as a result. The damages cover amounts paid by the Employer which it was legally obligated to pay, and for which it did not receive reimbursement from a third party. Amounts which the Employer chose to pay but which it was not under a legal obligation to pay are not awarded.

DECISION: 91-069

Annapolis County Municipal Housing Corporation Adult Residential Centre & Supervised Home AND Canadian Union of Public Employees, Local 2859

Veniot, Milton J. - Arbitrator

Laurie Hitchens, for the Union
Kenneth Fowlie, for the Employer

June 28, 1991

ISSUES: Overtime 5:3200, - Refusal to work overtime 7:3632, 7:3634, 7:3636.

CIRCUMSTANCES: The grievor, a regular part-time employee, refused to work a night shift. She believed that the Employer knew she did not want to work nights or weekends when she received the job. A warning letter was placed in her file. The grievor asks to have this letter removed from her file. A policy grievance was also filed on the issue of whether the Employer has the right to require employees to work during their regularly scheduled hours off. The Employer claims that it has the right to require employees to work additional hours. Where the total hours worked per week exceed forty, overtime applies.

AWARD: The grievances fail. The Employer can require employees to work hours in addition to their regularly scheduled hours. There is no evidence that Employer accepted the Grievor's position viv-a-vis working nights or weekends. It would be in contravention of the collective agreement for the Employer or the Grievor to agree to such a variation of the collective agreement. There is no medical evidence to support the Grievor's claim of a medical condition which prohibits her from working nights, nor can personal social

arrangements be used to justify a refusal to work the additional hours. The warning letter is an appropriate penalty.

DECISION: 91-070

Dominion Bridge-Atlantic AND United Steelworkers of America, Local 4122

Outhouse, Bruce - Arbitrator

Cal Luedee, for the Union
James Boudreau, for the Employer

July 5, 1991

ISSUES: Discipline and discharge - Grounds for 7:3000, - Insolent behaviour of obscene language 7:3660.

CIRCUMSTANCES: The grievor was suspended for two weeks without pay. The Employer claims that this is justified by the Grievor's verbal abuse of his new supervisor. The Grievor claims he did not know that the new supervisor was his supervisor. The Employer's regulations treat verbal abuse as an "intolerable" offence, for which discharge is the normal penalty. In view of the Grievor's long employment history and work record, suspension was deemed more suitable. The Grievor has refused to apologize to the supervisor.

AWARD: The grievance fails. The Arbitrator accepts the supervisor's account of the incidents. There is no plausible reason for the supervisor to fabricate the allegations, and the Grievor's conduct at the hearing demonstrated his negative attitude, "unrepentant contempt", and inablility to constrain himself from verbally attacking the supervisor. The Grievor knew or should have known as of the time of the incident the identity of the new supervisor.

DECISION: 91-071

Victoria General Hospital AND Canadian Brotherhood of Railway, Transport & General Workers, Local 606

Slone, Eric K. - Arbitrator

Gordon Forsyth, for the Union
William Wilson, for the Employer

July 8, 1991

ISSUES: Skill and ability 6:3000, - Arbitral review 6:3100 - Senior employee with required ability 6:3210; - Criteria of ability and qualifications 6:3300 - Requirements of the job 6:3100.

CIRCUMSTANCES: The Grievor claims she should have been awarded one of three permanent positions as laundry worker because she is senior to all successful candidates. The Employer argues that the Grievor lost any seniority she had earned as a permanent worker in another department when she became a temporary worker in the laundry, and that she does not have the qualifications of the successful candidates. The Union argues that the interview process was flawed.

AWARD: The grievance succeeds. The Employer recognizes the Grievor's seniority for purposes of vacation, and cannot argue that she has lost seniority otherwise, the interview process is substantially flawed. It did not measure the candidates' skill, ability or merit except to a slight and insignificant degree. The positions are unskilled work, which the Grievor and the three incumbents had all been doing on a temporary basis. A fresh competition is ordered, to be restricted to the three incumbents and the Grievor. A new interview panel is to conduct the selection process, and at least one of three should be from the Laundry Department. Skill and ability may be determined by practical demonstrations, observation, and performance appraisal. The Grievor should receive one of the three positions by virtue of her seniority unless all three of the incumbents are superior.

DECISION: 91-072

Simmons Canada Inc. AND Energy & Chemical Workers Union, Local 825

Cromwell , T. - Chair; Sadoway, P.; Durnford, E.

Anneli LeGault, for the Union
John Kane, for the Employer

July 8, 1991

ISSUES: Leave of absence 7:3120, - Management rights 7:3120.

CIRCUMSTANCES: The Grievor claims the Employer violated the collective agreement when it refused her the maximum six month maternity leave allowed by the agreement. The Employer argues that over the statutory period, it has discretion to refuse a longer leave based on operational considerations.

AWARD: The grievance succeeds. The provisions are mandatory with respect to granting an employee's request for maternity leave if the request falls within the conditions set out by the agreement. In this case, the Employer had no discretion to refuse.

DECISION: 91-073

Dawcolectric Ltd. AND International Brotherhood of Electrical Workers, Local 625

DeMont, Eric G. - Arbitrator

Ronald Pink, for the Union
Greig MacLeod, for the Employer

July 9, 1991

ISSUES: Discipline and discharge - Just cause 7:1200; Apprentices 7:5000 fn 12.

CIRCUMSTANCES: The Grievor, an apprentice electrician, was laid off by the Employer when it discovered he was not an indentured apprentice. Although a temporary work permit was issued by the Department of Advanced Education and Job Training, the Employer refused to hire the Grievor back. The Union argues that according to the Collective Agreement, the Grievor is an apprentice, and should not have been discharged. The Employer argues that the Grievor is not an apprentice within the meaning of the Apprenticeship and Trades Qualifications Act. The Union also argues the Employer is estopped from discharging the Grievor because of assurances made at the time of the signing

of the Mainland Apprentice Committee (M.A.C.) Agreement that the agreement would not be applied to persons who were already apprentices at the time the agreement came into force. It is alledged that the Employer did not wish to hire the Grievor because it would have had to pay him a board allowance.

AWARD: The grievance succeeds. By virtue of s. 40(2) of the Act, the collective agreement is paramount. Under its terms, the Union has the right to determine which apprentices it supplies. The Grievor, having been referred, has the right to the job. The Employer is directed to hire the Grievor, and to pay him back pay but not a retroactive board allowance.

DECISION: 91-074

Chardan Enterprises Ltd. AND Labourers International Union of North America, Local 615

MacLellan, J.A. - Arbitrator

Jack Graham, for the Union
John C. MacPherson, for the Employer

July 19, 1991

ISSUES: Jurisdiction - Concurrent jurisdiction - Administrative agencies 1:4000, 1:4100.

CIRCUMSTANCES: At issue is a jurisdictional dispute over which of two unions had jurisdiction over certain work. The other union was not a party to this grievance or represented at the hearing. The Employer objected to the Arbitrator's jurisdiction on the grounds the matter should properly be heard by the Construction Industry Panel of the Labour Relations Board. It argued that the Panel was the proper forum to settle a jurisdictional dispute, as all parties could be heard.

AWARD: The preliminary objection succeeds. The Arbitrator found that he had no jurisdiction, but even if he had, he would decline to hear the matter and refer it instead to the Construction Industry Panel of the Labour Relations Board.

DECISION: 91-075

Stora Forest Industries AND Canadian Paperworkers Union, Local 972

Cromwell, T. - Arbitrator

Dennis Grant, for the Union
Eric Durnford, for the Employer

July 19, 1991

ISSUES: Technological change - Collective agreement restrictions 5:2200.

CIRCUMSTANCES: Certain equipment maintenance work was re-assigned from millwrights to operations employees after the installation of a new piece of equipment. This transfer of work is grieved as a violation of existing work practices, improperly transferring work from a trade group to production employees. The Employer argues that the work is in fact new work, not 'existing' work, and that the section of the collective agreement does not apply.

AWARD: The grievance fails. The Arbitrator agrees that the work in question cannot be described as "existing work". The change in equipment was significant enough that the Technological Change provision regarding "equipment of a different nature or kind then previously utilized" had been invoked. No millwright jobs have been lost; the purpose of the clause in protecting the work of employee groups is not undermined.

DECISION: 91-076

Scotsburn Brookfield AND Bakery, Confectionary & Tobacco Workers International Union

Kydd, William H. - Arbitrator

Rene Quigley, for the Union
Garth Illsley, for the Employer

July 15, 1991

ISSUES: Schedules 5:3100; Management rights - Schedules 5:3100; Estoppel 2:2200, 2:2210, 2:2220.

CIRCUMSTANCES: The Grievor is a delivery driver. His schedule was changed by the Employer so that instead of receiving time and one-half for working on his regular Tuesday

off on weeks with a holiday Monday, he received an alternate day off. Drivers are notified a week before any change to their schedule. The Union argues that the Grievor should receive overtime for working on his regular day off. The Employer states the grievor now works four days in a holiday week instead of the previous five, and overtime is not applicable.

AWARD: The grievance fails. The Employer acted reasonably and in good faith. Its past practice cannot be taken as a promise or assurance intended to affect legal relations. Promissory estoppel is not applicable. Scheduling is a management prerogative.

DECISION: 91-077

Halifax (City) AND Halifax Civic Workers Union, Local 108, Unit One

Veniot, Milton J. - Arbitrator

Charles A. MacDougall, for the Union
Mary Ellen Donovan, for the Employer

July 15, 1991

ISSUES: Retroactivity 4:1610; Collective agreement - Terms of operation - Retroactivity 4:1610; Interpretation - Canons of construction 4:2100.

CIRCUMSTANCES: A previous merit award in an arbitration between these parties dismissed the union's claim for retroactive pay but allowed a grievance on pay rates for returning student workers. That decision reserved jurisdiction to deal with the appropriate remedy if the parties were unable to agree. The union's position was that returning students should have received the regular rate of pay, based on their having completed a probationary period of employment in previous summer employment. The employer argued that under the new collective agreement, summer students were to be compensated as new employees. Terms in the new agreement denied retroactive pay entitlement to seasonal student employees.

AWARD: The grievance fails. The agreement clearly states that the employer's obligation to provide retroactive pay and benefits does not extend to student employees. In the earlier merits award, the 1989 student workers were held to be employees upon their recall in 1990. Therefore, once the employer makes the adjustment to the hourly rate for 1990, the summer students are found to be properly compensated. They are not entitled to retroactive compensation for time worked in 1989. Jurisdiction is retained to consider any other issues arising from this award on merits.

DECISION: 91-078

Dartmouth Senior Care Society AND Canadian Union of Public Employees, Local 2774

Kydd, William H. - Chair; McDougall, Donald H.; Weir, Charles

Larry Power, for the Union
Eric Durnford, for the Employer

July 10, 1991

ISSUES: Supervisors - Bargaining unit work 5:1400; Work assignment - Contracting out - Employees outside unit 5:1400.

CIRCUMSTANCES: The union claims the employer breached the agreement when the director of maintenance, a non-bargaining unit employee, did bargaining union work over a period of several weeks. As remedy, the union seeks a declaration that the director cease doing bargaining unit work. The employer maintains that the work done by the director of maintenance was work normally performed as part of his routine duties. Evidence showed this practice of sharing work between bargaining and non-bargaining unit employees was followed in other departments.

AWARD: The grievance fails. Part of the directors job duties, even before the first collective agreement, involved tasks now within the bargaining unit. There is no evidence that the amount of bargaining unit work performed by the director was sufficient to bring him within the bargaining unit.

DECISION: 91-079

Sobeys AND National Automobile, Aerospace & Agricultural Implement Workers Union of Canada, Local 1971

MacDonald, David J. - Arbitrator

Dale Patterson, for the Union
Donald H. McDougall, for the Employer

July 16, 1991

ISSUES: Management rights 4:2300; Job classifications and descriptions - Creation or revision - 5:2000; Skill and ability - Classification - 5:2000.

CIRCUMSTANCES: According to the agreement, the employer was permitted to lay off or reduce full-time employees to part-time status when a drop in retail sales occurred. When employees were laid off because of one such sales drop, a less senior employee was reassigned to a higher paid position which the grievor claimed should have been assigned to her because of her seniority. In addition, the grievor claimed her pay should be adjusted retroactive to the date of her proper reassignment. The union argued that if the sales drop triggered the layoffs while there was still bargaining unit work to be performed, then this work should be reassigned according to seniority. Alternatively, if a vacancy is created by the layoffs, then the requirements for job posting must be followed. The employer claimed that the layoffs did not create a vacancy to be filled by job posting. Instead, the position was to be filled by an employee with the immediate ability to perform the job requirements.

AWARD: The grievance fails. Management rights in the agreement allow the employer to reclassify and transfer employees. The layoffs did not create a vacancy which required the employer to follow job posting requirements. Instead the position was properly filled by reclassification.

DECISION: 91-080

Dartmouth Adult Service Centre (DASC Industries) AND Canadian Union of Service, Education & Allied Workers

Archibald, Bruce P. - Chair; D'Orsay, John; McNamara, Kevin

Ronald Stockton, for the Union
John H. Graham, for the Employer

August 7, 1991

ISSUES: Probationary employee - Discipline - Standard of review of disciplinary action 7:5000, 7:5020 ; Termination - Probationer 7:5020; Reasonableness - Unsuitability 7:3530; Good faith - Probationer discharge 7:4414, Scope of arbitral review 7:5020; Remedies - Type of grievance - Discharge or suspension 2:1421.

CIRCUMSTANCES: The grievor was hired as a probationary employee. Her employment was terminated prior to the completion of a four month probationary period. The union grieved the termination on her behalf. The employer's position was that based on the agreement, an arbitration board must not interfere with the employer's decision to terminate probationary employment unless that decision is clearly unreasonable. Further, it claimed that once a prima facie case for termination is made, the onus shifts to the union to prove discrimination, bad faith or arbitrariness. The union argued that the employer's right to terminate probationary employees at its sole discretion must be exercised according to

standards which are fair and reasonable, based on management rights in the agreement. Therefore, the onus is on the employer to show that its standards of evaluation and the conclusions it reached are reasonable. The employer argued its decision to terminate was based on the grievor's violation of guidelines in the policy manual, on formal individual evaluations and meeting with the grievor and on meetings between grievor's supervisor and other instructors. It alleged the grievor showed an inappropriate attitude to staff and breached her duty of confidentiality among other policy violations.

AWARD: The grievance succeeds in part. Termination provisions for probationary employees must be exercised in accordance with the standards set by the agreement's management rights clause, that is, in a fair and reasonable manner. Here the employer terminated the grievor's employment largely on the basis of the supervisor's evaluation. Further, the employer did not have a clear and enforced confidentiality policy which was required to ensure a fair and reasonable standard of evaluation. While the grievor admitted using profanity, there was no evidence of a substantial breach of this policy. It would be unreasonable to terminate a probationary employee where this policy was not strictly enforced. Nor was the grievor sufficiently informed of the employer's requirements in preparing planning schedules, particularly where this requirement was not stated in her job description. The unrelated incidents of the grievor's administrative errors were not, in themselves, grounds for termination according to fair and reasonable standards of evaluation. Therefore, the grievor was not terminated in a fair and reasonable manner. However, undeniable problems with the grievor's probationary performance were identified. As a result, the grievor is to be reinstated subject to a renewed probationary period, commencing the date of the award. Furthermore, the supervisor who initially terminated the grievor shall not be excluded from the grievor's subsequent evaluation. The grievor is entitled to pay and benefits for her work time lost, subject to deductions equal to any earnings she may have had from other employment during the period of her termination. Jurisdiction is retained to deal with any issue arising from the implementation of this award.

DECISION: 91-081

Citadel Properties Ltd. AND Bakery, Confectionery & Tobacco Workers International Union, Local 446

Kydd, William H. - Arbitrator

Rene Quigley, for the Union
Karin McCaskill, for the Employer

July 18, 1991

ISSUES: Schedules 5:3100; Management rights - Schedules 5:3100; Working hours and shifts 5:3100 - Reduction of hours 6:2210.

CIRCUMSTANCES: The Grievor and other bar employees had their shifts reduced from eight to seven and one-half hours. The Grievor claims that as senior employee, her hours should not have been reduced. The Employer argues that there is no guarantee of eight-hour shifts, and that it has equally distributed the available work among its employees.

AWARD: The grievance fails. The Arbitrator concurs that the collective agreement does not guarantee eight-hour shifts, and that the Employer is obligated to distribute equally the available work among all employees.

DECISION: 91-082

Ben's Ltd. AND Bakery, Confectionery & Tobacco Workers International Union, Local 446

Kydd, William H. - Arbitrator

Rene Quigley, for the Union
Robert Dunn, for the Employer

July 19, 1991

ISSUES: Schedules 5:3100; Management rights - Schedules 5:3100.

CIRCUMSTANCES: The Grievor's job as receiver involves delivery of ingredients to the Employer's main bakery plant from its warehouse. The Employer changed the Grievor's schedule to conform to a new delivery procedure involving the delivery of most ingredients on a weekly, rather than a daily basis. This weekly delivery was scheduled for Sunday mornings because of the limited number of loading bays at the Employer's plant. The Grievor claims that as a production employee, the collective agreement prohibits him from being compelled to work before 8:30 p.m. on Sundays. The Employer argues that the Grievor is not a production employee, and the prohibitive clause does not apply.

AWARD: The grievance succeeds. The Grievor has been listed in the wage/classification schedule to the collective agreement as a production employee since 1981. The daily delivery of ingredients is characterized as production work. Weekly delivery of a large order cannot change the nature of the work.

DECISION: 91-083

Domtar Inc., Domtar Chemicals Group (Sifto Salt Division) AND Energy & Chemical Workers Union, Local 824

MacDonald, D.J. - Chair; McDougall, Donald H.; LeBlanc, Norman

John Kane, for the Union
Leslie Foreman, for the Employer

July 17, 1991

ISSUES: Discipline and discharge - Grounds for 7:3000 - Alcoholic beverages 7:3560; - Fighting or threatening 7:3430; - Damage to employer's property 7:3410; Disciplinary penalties 7:4000, - Mitigating factors 7:4400.

CIRCUMSTANCES: The Grievor was discharged following a series of incidents during one evening shift. Reasons stated in the letter of dismissal were wilful damage to the Employer's property, insubordination, endangering the safety of other employees on the shift, fighting, and threatening other employees. The incidents occurred after the Grievor had combined alcohol and non-prescription valium. The Union seeks reinstatement with full benefits.

AWARD: The grievance fails. The Grievor operated a tow-motor, which he was not assigned to do, while in an impaired condition, and must be held responsible for the damages. He did this against the orders of a supervisor, and on two occasions refused to obey an order to go home. His impairmant posed a danger to his fellow employees. He attempted to hit one man, and threatened two others. The Grievor initially lied about the alcohol and drugs he had consumed, and has failed to follow-through on a rehabilitative program. He has shown no remorse, nor does he indicate that he has accepted any responsibility for his actions. He has taken no concrete steps which would demonstrate rehabilitative potential. Given his relatively short work history with the Employer, his previous disciplinary record, and the serious nature of the incidents which occurred, discharge is an appropriate punishment.

DECISION: 91-084

Halifax (City) AND Halifax Firefighters' Assn., Local 268

Slone, Eric K. - Arbitrator

Kimberly Turner, for the Union
Mary Ellen Donovan, for the Employer

August 14, 1991

ISSUES: Overtime 5:3200, - Right to claim 5:3220, 4:2100.

CIRCUMSTANCES: The grievors are four communications technicians who work rotating shifts. At full complement, the division has five technicians. When one of the five resigned, the Employer scheduled the grievors to work the shifts of the fifth employee by eliminating the so-called "day work" shifts. The Union claims this re-scheduling was done to minimize the overtime payable. The Employer argues that the fifth position is in the nature of an "on call" position, and that its re-scheduling was within management rights.

AWARD: The grievance succeeds. "Day work" is clearly work that needs to be done, although of a lesser priority than the actual staffing of the communications station. The fifth position is not simply an "on call" position. The Day Work was eliminated from the schedule for no obvious reason other than to reduce the hours of overtime the Employer would have had to pay. The Employer has not displaced the prima facie evidence of intent. There is nothing in the Standard Operating Procedure manual which specifically contemplates rescheduling an employee's time off in such a way that the full 12 hours of overtime for a shift might be avoided or lessened. The Arbitrator sets out guidelines for determining whether overtime was payable for shifts, and the Employer is directed to review the shifts worked during the period of the vacancy, and to pay overtime as appropriate. Interest is also to be paid on the outstanding amounts.

DECISION: 91-084.A

Halifax (City) AND Halifax Firefighters Assn., Local 268

Slone, Eric K. - Arbitrator

Kimberly Turner, for the Union
Mary Ellen Donovan, for the Employer

November 22, 1991

ISSUES: Overtime 5:3200.

CIRCUMSTANCES: This is a supplementary award which addresses the quantum of overtime compensation to be paid the grievors. The Employer and Union have been unable to agree on the amount. The issue is whether, as the Employer argues, it may use the "day worker" to fill in for night shifts on a long-term basis.

AWARD: The Employer is successful. There is nothing in the collective agreement which precludes use of the day worker to fill in for all shifts as a means of dealing with a long-term absence, so long as the workable day shifts are not eliminated.

SEE ALSO: 91-084

DECISION: 91-085

Bergengren Credit Union AND Union of Bank Employees, Local 2107

DeMont, Eric G. - Chair; McDougall, Donald H.; MacDonald, Alex

Linda Gallant, for the Union
Eric Durnford, for the Employer

August 15, 1991

ISSUES: Interpretation - Aids to interpretation - Past practice 2:2220, Ambiguity 2:2220, 3:4400, 3:4410; Extrinsic evidence 3:4400; Evidence - Types of evidence - Extrinsic evidence - Estoppel 2:2200, Negotiating history 3:4420, Past practice 3:4430, Procedure for receiving 3:4410; Past practice 3:4430; Estoppel 2:2210, 2:2220; Collective agreement - Oral agreements - Estoppel 2:2210, 2:2220, Ambiguity 2:2220, 3:4400, 3:4410.

CIRCUMSTANCES: The union alleges the employer violated the agreement by refusing to allow employees time off with pay to attend medical appointments for their children. The

union argued that because terms in the agreement dealing with paid time off for doctors appointments were ambiguous, it was necessary to consider past practice and negotiating history as aids to contract interpretation. The employer maintained that because medical leave terms were unambiguous, the union must not be permitted to rely on past practice; moreover, where employees had in the past been allowed to take time off to attend medical appointments with family members, the practice was now to be cancelled. Further, it argued that extrinsic evidence cannot be used to create an ambiguity in the agreement, but may only be referred to after an ambiguity had been established. Where the agreement was silent on the issue of leave to attend children's medical appointments, that silence did not create an ambiguity in the agreement. The Board agreed to hear evidence to determine the union's claim of ambiguity.

AWARD: The grievance fails. The specific clause on medical leave must be read in light of the entire article to determine its application. There is no ambiguity in the clause and its application does not extend to leave for children's medical appointments. The employer's objection to the use of past practice and negotiating history as aids to interpretation is upheld.

DISSENT: (MacDonald) Ambiguity exists in the agreement arising from a combination of past practice and language in the medical leave clause.

DECISION: 91-086

Western Electrics Ltd. AND International Brotherhood of Electrical Workers, Local 625

Kydd, William H. - Arbitrator

Ronald Pink, for the Union
William MacInnes, for the Employer

August 15, 1991

ISSUES: Interpretation - Words and phrases - Reasonable or practical 5:3224, Reasonableness 4:2100; Reasonableness - Interpretation 4:2100; Remedies - Damages - Measure 2:1410.

CIRCUMSTANCES: The employer's grievance claimed the union breached the agreement by failing to supply workers who lived near the work site. It was alleged this failure increased the employer's expenses for travel and board. In response to the employer's specific request to provide workers living near the job, the union selected an employee whose normal residence was more than 200 kilometers away. The employer argued that the union was limited in its selection of workers by mandatory, and not permissive, terms in the

agreement. It maintained that the phrase "when practical" did not give the union unlimited discretion. The union claimed that its practice was to first offer work to members residing in the geographic unit, with priority given to those members unemployed the longest. The worker selected by the union was chosen because his unemployment insurance benefits were nearly expired. The union argued this means of selecting workers had been relied on for more than 10 years without previous questioning by the employer. The union tendered evidence of negotiating history to support its claim that terms in the agreement requiring the union to supply workers living close to the job site were discretionary.

AWARD: The employer's grievance succeeds. Negotiating history is not relevant here in resolving ambiguity in the agreement. The use of the words "when practical" gives the employer a legitimate right to expect the union to minimize board and travel expenses so far as practical. Instead, the union's policy was to select workers on the basis of its out of work list. It disregarded its obligation to minimize travel and living expenses. The union will pay damages to the employer equal to the amount he paid as travel expenses. Jurisdiction is retained if the parties are unable to agree on the amount owing.

DECISION: 91-087

Construction Management Bureau Ltd. (L.J. Casavechia Contracting Ltd.) AND
Labourers International Union of North America, Local 615

Veniot, Milton J - Arbitrator

Gordon Forsyth, for the Union
Eric Durnford, for the Employer

September 4, 1991

ISSUES: Bargaining unit - Contracting out of 5:1300; Contracting out 5:1300; Work assignment - Contracting out 5:1300.

CIRCUMSTANCES: The union alleged the employer hired non-union employees to work within the union's jurisdiction, in violation of job security terms in the agreement. The employer argued that because it was not bound by the agreement, the arbitrator did not have jurisdiction to hear the matter. It maintained that because it had not entered into any voluntary recognition with the union, the agreement was not binding. The union responded that because the employer had agreed to join a construction management association, it remained bound by the existing agreement.

AWARD: The grievance is dismissed; the employer is not bound by any agreement with the union. Evidence indicated there was never any intention on the employer's part to be bound by the voluntary recognition agreement. Any indication by the employer of its

membership in a construction management association was the result of a unilateral mistake. Any contract which existed between the parties arose by mistake and it would be inequitable to allow enforcement of the agreement against the employer. The union's argument that a mistake by the employer's agent was ratified by the employer fails as the employer did not know of any agreement with the union.

DECISION: 91-088

Dartmouth (City) AND Nova Scotia Union of Public Employees, Unit #1

MacLellan, J.A. - Chair; Durnford, Eric; D'Orsay, John

Ron Stockton, for the Union
Michael Moreash, for the Employer

July 31, 1991

ISSUES: Call-in pay - Purpose 8:3410; Overtime - Call-in pay 8:3410; Statutes - Applied by boards of arbitration 1:5400, 2:2100; Board of arbitration - Jurisdiction - Application of statutes 2:2100; Interpretation - Reasonableness 4:2100.

CIRCUMSTANCES: The grievor's duties as foreman included responding to work-related telephone calls at home and directing work to be done in response to those calls. The grievor claimed compensation, based on call out provisions in the agreement, of four hours' pay for each call received or overtime pay, whichever was greater. While the employer conceded that telephone calls received and the decisions made constituted work eligible for compensation, the issue to be determined was whether call out provisions in the agreement applied. The grievor claimed that because employees were directed to contact him at home when the superintendent was unavailable, the grievor's home should be designated as his workplace, entitling him to call out pay. The employer maintained that, on the facts, the grievor is not called out for duty, that he is not called by the employer, and that it would be unreasonable to compensate the grievor with four hours' pay for each call received.

AWARD: The grievance succeeds in part. The after hours calls and decisions made by the grievor do not meet the terms of the call out provisions in the agreement. However, in view of the inconvenience caused and the work performed during his off- hours, the grievor is entitled to be paid according to overtime provision in the agreement, provided that the time and work performed is properly documented.

DISSENT: (D'Orsay) The grievor should be entitled to call out pay. Compensation based only on overtime pay rates is unconscionable. It is not necessary to determine if the grievor must physically return to the work place to be eligible for call out pay. The telephone calls are work and the grievor is entitled to at least the minimum payment prescribed by the N.S.

Minimum Wage Order, s. 10(1) dealing with recall. The Board's interpretation of the agreement is inconsistent with the binding terms of the Minimum Wage Order.

DECISION: 91-089

Dartmouth (City) AND Police Assn. of Nova Scotia, Local 101

Christie, Innis - Chair; Stockton, Ronald A.; Durnford, Eric

David W. Fisher, for the Union
Michael Moreash, for the Employer

September 11, 1991

ISSUES: Pension plans - Benefits 2:1200; Interpretation - Intention of the parties 4:2100, Canons of construction 4:2100; Rectification - Board of arbitration 2:1440.

CIRCUMSTANCES: The union alleged the employer breached terms in the agreement by refusing to allow the grievor to join the employer's pension plan. As remedy, the union sought an order requiring the employer to permit the grievor to join the pension plan, or, alternatively, an order that the employer pay the grievor damages sufficient to place her in the position she would have held had she been allowed to join the pension plan. The grievor became a police officer and union member in 1971, approximately 1 year after the pension plan began. She did not join the plan because it contained discriminatory provisions leaving survivor's benefits to widows only. The discriminatory terms were not amended until 1981. The employer's evidence was that the grievor had been asked to join the plan but she had declined. The employer argued that terms in the agreement dealing with membership in the plan did not apply to the grievor because she was not a member of the police union when the plan began.

AWARD: The grievance succeeds, based on an appropriate interpretation of the agreement's pension plan terms. The grievor was entitled to join the plan in accordance with its provisions, and the Board has no power to rectify those terms. Jurisdiction is retained to deal with remedy or any other issue arising from this award.

DISSENT: (Durnford) The key issue is whether pension plan terms apply to the grievor who was not a member of the bargaining unit when the plan began in 1970. Terms giving members the discretionary right to join the pension plan at a date later than the formal commencement of the plan were not intended to cover the grievor as she was not a member of the unit in 1970. A preferred remedy in the present case would be to negotiate pension plan benefits for the grievor rather than allow the majority award.

DECISION: 91-090

Halifax (City) AND International Assn. of Firefighters, Local 268

Cromwell, T.A. - Arbitrator

Ronald A. Pink, for the Union
M.E. Donovan, for the Employer

September 13, 1991

ISSUES: Job posting - Fair and reasonable 5:2520, Posting procedure 5:2520; Interpretation - Canons of construction 4:2100, Context 4:2300.

CIRCUMSTANCES: The union grievance involved three separate issues of interpretation relating to a letter of intent between the parties. The union maintained that the employer had an ongoing obligation to train the most qualified employees first; the employer argued that obligation related only to the implementation of an engineer position in January 1989. Second, the union maintained that all employees who were trained on the required equipment were to be promoted to the position of engineer and receive the additional pay relating to the position. The employer said that requirement related only to the implementation of the engineer position in January 1989. Third, the union maintained the employer failed to recruit employees for vacancies on the engineer spare board as required in the letter of intent. The employer argued is was not required to give written notice of vacancies in order to comply with its obligations.

AWARD: The grievance fails on all but the third issue. Based on express terms in the letter of agreement and the context in which the terms were used, the union's argument regarding training compensation fails. Implementation of the terms is limited to the period up to January 1989. On the issue of notifying candidates for training opportunities, the grievance succeeds. The employer must issue a notice each time a training course is to be offered, and that notice should be issued through normal departmental procedures.

DECISION: 91-091

Dartmouth (City) AND Nova Scotia Union of Public Employees, Local 4

Mont, Stephen K. - Chair; Durnford, Eric; Fisher, David W.

Ron Stockton, for the Union
Michael Moreash, for the Employer

n.d.

ISSUES: Job classifications and descriptions - Creation or revision 5:2440; Arbitrability - Subject matter limitations 2:1200.

CIRCUMSTANCES: The union alleged the employer had not complied with an agreement to reclassify the position of tax collector/by-law officer to a higher level and compensate employees in that position with retroactive pay. A 1987 departmental evaluation of the position was disputed by the grievors and the evaluation appealed to an employer/employee Appeal Committee. The principal issue before the Board was whether a finding was made by the Appeal Committee. The employer's position was that no final decision was to be made by the Appeal Committee until all other evaluation appeals had been completed.

AWARD: The grievance cannot be arbitrated. There was a duty on the part of all Appeal Committee members to act fairly and in accordance with the principles of natural justice. While a consensus was reached that the position should be reclassified to a higher rank, the employer majority of the Committee understood that this was not a final decision. As a result, there was no finding by the Committee because the process was incomplete. Therefore, the Committee should reconvene to make a final decision as required by the agreement. If the grievors are not satisfied with the result of the finding of the reconvened Committee, that finding may be the subject of further arbitration on the merits of the reclassification.

DECISION: 91-092

Western Electrics Ltd. AND International Brotherhood of Electrical Workers, Local 625

Kydd, William H. - Arbitrator

Raymond Larkin, for the Union
William MacInnes, for the Employer

April 23, 1991

ISSUES: Rectification - Board of arbitration 2:1440; Board of arbitration - Jurisdiction - Application of statutes 2:2100; Jurisdiction - Rectification 2:1440; Interpretation - Aids to interpretation - Past practice 2:2220, Ambiguity 2:2200, 3:4400, 3:4410; Evidence - Types of evidence - Extrinsic evidence 3:4400, Past practice 3:4430, Procedure for receiving 3:4410; Past practice 3:4430.

CIRCUMSTANCES: The arbitration dealt with two issues: first, whether the principle of rectification should be applied where the definition of "job" in the agreement does not express the intent of the parties, and second, whether the arbitrator has the power to rectify error in the agreement. The employer argued the matter was not a proper case for rectification as the parties were never in complete agreement on the meaning of terms and that the definition of job applying to all articles in the agreement arose from a drafting error. The employer further argued that the grievance should be dismissed because even after rectification, the wording in the agreement did not support the union's interpretation.

AWARD: The grievance succeeds. In Nova Scotia, the Trade Union Act provides for statutory as well as consensual arbitration in the construction industry. Therefore the arbitrator's authority is derived not from the collective agreement but from statute. Because nothing in the Trade Union Act implies to the contrary, an arbitrator does have the statutory power to rectify agreements in the construction industry. Further, in the absence of any express limitation in the agreement, an arbitrator has the implied authority to rectify that agreement. In the present case, in view of the clear evidence of the parties' intentions, it would be unfair not to rectify the agreement. Because latent ambiguity existed, evidence of past practice is admissible and relevant. That evidence clearly showed the parties interpreted the agreement in the manner advocated by the union. In allowing the union's grievance, determination of damages is reserved, on the understanding that the parties will agree on the appropriate amounts.

DECISION: 91-093

Western Electrics Ltd. AND International Brotherhood of Electrical Workers, Local 625

DeMont, Eric G. - Arbitrator

Raymond F. Larkin, for the Union
William L. MacInnes, for the Employer

September 18, 1991

ISSUES: Employer grievance 2:3120; Grievance - Employer grievance 2:3120; Grievance procedure - Delay 2:3210; Remedies - Types of remedy - Damages - Measure 2:1410, Mitigation 2:1412.

CIRCUMSTANCES: The employer's grievance claimed damages for an alleged union violation of the agreement, stemming from the union's practice of not selecting workers from the geographical area nearest the work site in order to reduce the employer's travel and board expenses. A previous arbitration (Kydd Award) found that the union had disregarded its contractual obligation to minimize travel and board expenses. As that award is under appeal, the union acknowledged, for the purposes of this award only, that it has violated the agreement and that the only issue to be resolved is quantum of damages. The union's argument raised five issues: unreasonable delay by the employer in bringing forward its grievance should disallow any claim for expenses paid up to 23 August 1991; no damages are payable after the Kydd Award because that decision held that no board/travel expense was payable to any employees who were improperly referred; no damages were payable with respect to 6 employees referred on 27 August because the union gave the employer the option of not paying their expenses; the employer failed to mitigate its loss by refusing to pay employees their expenses; and damages would constitute unjust enrichment of the employer since it must have included travel and board expenses in its tender. The employer's evidence was that 13 employees claiming expenses were referred to the job site in violation of provisions in the agreement.

AWARD: The employer's claim for damages is allowed. By 19 August, the union had received the Kydd Award and was aware that its referral practice was in violation of the agreement. Therefore the employer's formal grievance notice and application to the Minister of Labour to appoint an arbitrator were within a reasonable period of time. The employer was required by the agreement to pay the 6 referred employees their travel/board expenses. Neither did the employer fail to mitigate its losses when it paid the expenses. Because the employer based its tender on the availability of employees within the geographic area, no amount was included in the tender for travel/board expenses. The union's claim of unjust enrichment fails because the evidence does not support such a claim. Jurisdiction is reserved to determine quantum of damages if the parties are unable to agree.

SEE ALSO: 90-130

DECISION: 91-094

Metropolitan Authority (Metro Transit Division) AND Amalgamated Transit Union, Local 508

Christie, Innis - Arbitrator

Kimberly H.W. Turner, for the Union
Terry L. Roane, for the Employer

September 15, 1991

ISSUES: Seniority 6:000 - Applications - Promotion, demotion and transfer 6:2000, 6:2100; Skill and ability - Arbitral review 6:3100; Promotion, demotion and transfer - Reasonableness 6:3100, Vacancy 5:2510; Job posting 6:2310 - Bona fides 5:2300, Fair and reasonable 5:2520, Vacancy 5:2510; Reasonableness - Job posting 6:2310; Work assignment - Vacancy 5:2510.

CIRCUMSTANCES: The union's grievance held that the employer failed to select candidates for a driver-instructor position according to qualification set out in the agreement. The employer raised the preliminary objection that the arbitrator was without jurisdiction because the part-time assignment of employees as driver-instructors was inarbitrable. The parties agreed to allow the arbitrator to make a finding as to the arbitrability of the issue and to determine which if any provisions of the agreement are applicable. In the dispute as to whether the driver-instructor position was a new job, the employer held that it was not a new position; the union maintained the employer's posted notice was a regular job posting. The two candidates eventually selected were not the most senior applicants because the employer gave greater priority to their ability to train, evaluate and communicate than to their employment seniority. The employer testified that a similar posting procedure had been used for recruiting tour guides, that candidates for those positions were not selected on the basis of seniority and that the union had not grieved that procedure. Similarly, seniority was not a factor in the procedure for selecting maintenance-instructors. The union argued that the selection was governed by job posting provisions in the agreement, that the employer was bound to act reasonably and without discrimination. The employer maintained that the temporary assignments were not new positions and that no position, vacancy or transfer was created. Based on its management rights, it had full responsibility to choose the driver-instructors.

AWARD: The employer's preliminary objection is denied. The selection of driver-instructors is governed by job-posting terms in the agreement because the employer has in fact treated the assignment of employees to the driver-instructor position as filling a

job vacancy. Neither does anything in the agreement state that the job posting provisions do not apply. Further, the employer is governed by terms requiring consultation with the union and due consideration to seniority when making promotion, demotions and transfers. Jurisdiction is retained to reconvene at the request of either party to determine the merits of the union's grievance.

DECISION: 91-095

Commonwealth Hospitality Ltd. - Holiday Inn, Sydney AND Hotel Employees & Restaurant Employees International Union

MacDonald, David J. - Chair; Durnford, Eric; Pickford, Tom

Blaise MacDonald, for the Union
Tom Donovan, for the Employer

September 5, 1991

ISSUES: Discipline and discharge - Grounds for - Insolent behaviour or obscene language 7:3660.

CIRCUMSTANCES: A waitress with 13 years' experience was suspended for 5 days for disrespectful conduct. On two consecutive days, she publicly displayed bad temper and profanity regarding management's handling of a scheduled tour bus luncheon. Her grievance alleged the suspension was unjust and claimed reimbursement for all lost earnings. Eye witness testimony from two off-duty housekeeping staff and their written complaint described the grievor's public profanity criticizing the duty manager. The grievor admitted to some profanity, but claimed her comments were made only in ear shot of the housekeepers. In the second incident, a written complaint was submitted by the dining room supervisor. The grievor claimed her behaviour on that occasion stemmed from a continued dissatisfaction with the duty manager.

AWARD: The grievance fails. The grievor's actions constituted misconduct warranting disciplinary action. Her disregard for proper public conduct and intimidating behaviour toward her supervisor showed total disregard for a written company code of conduct. Management alone has the right to make operating decisions. The grievor had no justification or excuse for her behaviour in response to such decisions. The suspension was based on a review of the grievor's record which included past incidents of similar misconduct. There were no mitigating factors and the discipline was appropriate.

DECISION: 91-096

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Outhouse, Bruce - Arbitrator

Ronald Pink, for the Union
Jonathan Davies, for the Employer

July 12, 1991

ISSUES: Overtime 5:3200.

CIRCUMSTANCES: The Grievors have accumulated overtime, and seek to be compensated for it in money rather than through time off in lieu (TOIL), which is the Employer's preferred mode of compensation for overtime for employees of the Grievors' bargaining group. The Employer claims the Grievors failed to notify it in good time of the amount of overtime accumulated, to allow for scheduled TOIL, before invoking the provisions relating to payment for overtime. The Employer does not dispute the overtime, but wishes to compensate for it through scheduled TOIL. The Union argues that operational requirements prevented TOIL requests, and that the Grievors should now be paid.

AWARD: The grievance fails in part. The Grievors' claims should be dealt with expeditiously by the Employer. The Employer is to have until the end of the year to arrange scheduled TOIL for the Grievors, but must compensate them in money by January 15, 1992 for any of the present overtime claim outstanding at December 31, 1991. The Grievors' claims were not advanced on a timely basis, and no requests for TOIL were actually made. The apparent practice of the Employer is to grant TOIL despite heavy workloads. If the Grievors wish to claim monetary compensation for overtime, it is incumbent upon them to give the Employer a reasonable opportunity to schedule TOIL.

DECISION: 91-097

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Slone, Eric K. - Arbitrator

Kimberly Turner, for the Union
Jonathan Davies, for the Employer

May 22, 1991

ISSUES: Interpretation 4:2000, 4:2100, 4:2300 - Intention of the parties 4:2100; Employee - Temporary, casual and part-time 5:1124.

CIRCUMSTANCES: This is a policy grievance with regard to part-time employee benefits. The Union argues that part-time employee benefits should be pro-rated in proportion to the hours actually worked. Many part-timers work more hours than they are "officially" designated for. The Employer argues that these extra hours are akin to overtime, and no increase in benefits attachs to them.

AWARD: The grievance fails. The interpretation of the Employer is more reasonable and administratively more feasible than that of the Union. The implementation of the interpretation put forward by the Union would be administratively unwieldy.

DECISION: 91-098

Nova Scotia (Civil Service Commission) AND Nova Scotia Government Employees Union

Cotter, Brent - Arbitrator

Gordon Forsyth, for the Union
Alison Scott, for the Employer

July 26, 1991

ISSUES: Working hours and shifts 5:3100; Management rights 4:2300, 5:0000 - Fairness 4:2300.

CIRCUMSTANCES: The Grievor, a receptionist, was denied her application to change her hours of works to a modified work week arrangement. The Union argues that permission

was unreasonably withheld. The Employer claims operational considerations justify its denial of her application.

AWARD: The grievance succeeds in part. Many of the operational considerations cited by the Employer do not appear to have been serious enough for the Grievor's supervisor to take any steps to remedy or address them on other occasions. All other clerical employees have modified work weeks, and while this does not create a right for the Grievor, it affirms her legitimate interests, which should be taken into consideration by the Employer. There is no evidence that this was done. The Employer is directed to reconsider the Grievor's application, taking her interests into consideration, and considering alternative means whereby a modified work week arrangement could be implemented.

DECISION: 91-099

Doug Burns Excavation Contracting Ltd. AND United Mine Workers of America, District 26

O'Connell, Charles - Arbitrator

Ron Cote, for the Union
Glen Couthro, for the Employer

October 17, 1991

ISSUES: Seniority 6:0000 - Applications 6:2000 - Bumping 6:2330.

CIRCUMSTANCES: The Grievor alleges that as senior employee he should have been called in to work an afternoon shift and a night shift. The Employer argues the Grievor was not qualified to do the available work on the afternoon shift, and that no answer was received when he was called by telephone regarding the night shift.

AWARD: The grievance fails. The Grievor is not entitled to bump the less senior but qualified employee who worked the afternoon shift, and the Grievor has failed to discharge the burden of proof about the phone call to work the night shift.

DECISION: 91-100

Glace Bay Community Hospital AND Canadian Brotherhood of Railway, Transport & General Workers Union, Local 607

MacDonald, David J. - Arbitrator

Victor Tomiczek, for the Union
Ken Fowlie, for the Employer

October 10, 1991

ISSUES: Interpretation 4:2000, 4:2100, 4:2300 - Intention of the parties 4:2100, Management rights 4:2310; Management rights 4:2300, 5:0000.

CIRCUMSTANCES: The Grievor claims that as a permanent part-time employee, she was entitled to work a vacant shift which a casual employee was assigned. The Employer argues that it was within its discretion to assign the shift to a casual employee as per the terms of a memorandum relating to additional shifts for part-time workers.

AWARD: The grievance fails. The shift became vacant after the first seven days of posting of the relevant work schedule, and the terms of the memorandum give management sole discretion on using part-time or casual employees in these circumstances.

DECISION: 91-101

Halifax (City) AND International Assn. of Firefighters, Local 268

DeMont, Eric G. - Arbitrator

Kimberly H.W. Turner, for the Union
Gerald J. Goneau, for the Employer

October 29, 1991

ISSUES: Insurance and welfare plans - Entitlement to benefits 8:3320, 4:2100; Insurance and welfare plans - Medical benefits and other benefits 8:3330.

CIRCUMSTANCES: The Grievor was on workers' compensation. When he was able to return to work, he was fit only for light duty, but no light duty was available. The Grievor opted to retire after exhausting his sick leave and using up his vacation. The Employer unilaterally backdated the date the Grievor's vacation was to start as a result of a change in

the law regarding mandatory retirement that required the grievor to retire at an earlier date. The Union claims this is a denial of the Grievor's sick leave.

AWARD: The grievance succeeds. The only purpose in the Employer's action was to save payment to the Grievor of sick leave days. The Grievor is entitled to be paid for unused vacation days at the time of retirement. The Employer is to compensate the Grievor for the appropriate number of sick leave days.

DECISION: 91-102

Cove Guest Home AND Canadian Brotherhood of Railway, Transport & General Workers, Local 620

Elman, Frank L. - Arbitrator

Warren MacDonald, for the Union
Victor Tomiczek, for the Employer

October 24, 1991

ISSUES: Seniority 6:0000 - Applications 6:2000 - Lay-off 6:2200; Lay-off 6:2200 - Defined 6:2200.

CIRCUMSTANCES: The Grievor claims to have been improperly laid-off, while a junior employee was kept on to do work in another department that the Grievor could have done. The Employer argues that the Grievor was not laid off, and alternatively that the Grievor was not qualified to do the available work.

AWARD: The grievance fails. The Grievor was not laid off; her hours were reduced as the result of employees with more seniority being employed in her department, not as a result of a reduction in the Employer's workforce. The Grievor was in an on-call employment relationship which was not terminated or suspended through lay-off.

DECISION: 91-103

Victoria Haven Nursing Home AND Canadian Brotherhood of Railway, Transport & General Workers, Local 620

Elman, Frank L. - Arbitrator

Victor Tomiczek, for the Union
Guy LaFosse, for the Employer

October 9, 1991

ISSUES: Disciplinary penalties - Arbitral review - Substitution of penalty 7:4000, Mitigating factors - Economic hardship 7:4424, Personal or emotional problems 7:3430; Discipline and discharge - Grounds for - Absence from work 7:3100, Reasonable excuse 7:3112, Prior record 7:4310, 7:4314; Time limits - Continuing grievance 2:3128, Delay 2:3210, Waiver of 2:3130; Procedure - Powers of board of arbitration - Preliminary objections 3:2100.

CIRCUMSTANCES: The union alleged the employer's termination of the grievor's job violated the agreement. The employer made a preliminary objection as to the timeliness of the arbitration, arguing that the union's notice of intention to arbitrate was outside time limits in the agreement. The parties agreed to give evidence on the merits of the case prior to dealing with the employer's objection. The grievor was a permanent part- time nurse's aide with 4 years' experience at the time of her dismissal. She had a good working relationship with patients and the employer, but was dismissed for missing work on two consecutive days when medical problems arose with her newborn child. Following a previous incident of absenteeism, the grievor was temporarily suspended and warned that a second incident would result in dismissal.

AWARD: Because the employer selected an arbitrator and proceeded to arbitration without raising the issue of timeliness, its preliminary objection is dismissed. The union's grievance succeeds in part. The employer's refusal to grant the grievor a leave of absence was neither unreasonable nor unfair, based on its difficulties in staffing and scheduling. However, because the grievor's absenteeism was based on legitimate family needs, dismissal is excessive, particularly where it would cause special economic hardship. The grievor shall be reinstated without compensation and without loss of seniority following a suspension from work ending October 18, 1991. On reinstatement, she shall maintain an average work attendance at least equal to the average of all other employees in the bargaining unit.

DECISION: 91-104

Halifax (City) AND Municipal Assn. of Police Personnel

Kydd, William H. - Arbitrator

Ronald A. Pink, for the Union
Mary Ellen Donovan, for the Employer

October 16, 1991

ISSUES: Statutory holidays - Holiday pay and other benefits - Sick leave benefits 8:3330; Vacation - Computation of vacation and vacation pay 8:3220, 8:3230, Sick 8:3330, Scheduling vacations 8:3240; Workers' compensation 8:3230, 8:3330.

CIRCUMSTANCES: The grievor alleged the employer failed to compensate him for holiday and vacation leave while he received worker's compensation. The grievor is a police constable who was injured on duty in 1987. Following surgical treatment, he returned to work a year later. During his absence, the grievor requested specific and alternative dates be designated as his holiday leave. The employer held that he would not be compensated for the loss of his vacation time on the grounds that the grievor's injury did not affect his ability to adequately enjoy his vacation. The union argued the grievor was entitled to postpone and reschedule his vacation.

AWARD: The grievance succeeds. The intent of vacation terms in the agreement is that a job-related disability entitles an employee to reschedule his vacation as chosen. The term "enjoy" must be interpreted in a subjective sense from the perspective of the employee. Secondly, the agreement allows an employee in receipt of workers' compensation benefits to be compensated with holiday pay during the period of his disability. The employer shall substitute the grievor's lost vacation and holiday entitlement at mutually convenient times. Jurisdiction is retained should the parties be unable to agree on the implementation of this award.

DECISION: 91-105

Steel Span Industries AND International Assn. of Bridge, Structural & Ornamental Iron Workers, Local 809

MacDougall, R. Lorne - Arbitrator

Robert S. Thomas, for the Union
Gerald Whitehead, for the Employer

October 31, 1991

ISSUES: Statutory holidays - Holiday pay and other benefits - Measurement of probationary period 7:5010, Qualifying days 8:3120; Probationary employee - Benefits 7:500, Probationary period 7:5010.

CIRCUMSTANCES: The union alleged the employer violated the agreement by not paying the grievor holiday pay for Victoria Day. The grievor was a probationary employee who had been hired 8 days before the holiday. The employer maintained that terms in the Labour Standards Code required employees to have worked at least 15 days prior to a general holiday before they could be compensated for the holiday.

AWARD: The grievance succeeds. On a strict interpretation of the agreement, the grievor was entitled to be paid for Victoria Day. Provisions in the Labour Standards Code relied on by the employer to deny payment for the holiday have no application where employees operate under a collective agreement. The grievor shall be paid for the holiday at his regular rate of pay.

DECISION: 91-106

N.S. Drywall Ltd. AND United Brotherhood of Carpenters & Joiners of America, Local 83

Mont, Stephen K. - Arbitrator

n/a, for the Union
n/a, for the Employer

October 18, 1991

ISSUES: Grievance - Settlement of grievance 2:3230.

CIRCUMSTANCES: The union alleged the employer violated the agreement by not remitting benefits as required for union members.

AWARD: Prior to arbitration, the employer admitted it violated the agreement. The employer is ordered to pay the union the amount the parties have agreed to as the total in outstanding benefits. If the employer fails to remit that amount, the union may have the award filed and enforced with the Nova Scotia Supreme Court.

DECISION: 91-107

ABCO Industries Ltd. AND Industrial Union of Marine & Shipbuilding Workers of Canada, Local 25

Kydd, William H. - Arbitrator

Les Holloway, for the Union
Robert Dunn, for the Employer

October 24, 1991

ISSUES: Skill and ability 6:3000, Arbitral review 6:3100, Criteria of ability and qualifications - Physical capabilities 6:3360; Reasonableness - Health evaluation 8:3342; Recall 6:2354, Burden of proof 3:2415 ; Fairness - Vacancy - Filling 6:3000; Good faith - Recall 6:2354; Remedies - Types of remedy - Damages - Measure 2:1410.

CIRCUMSTANCES: The grievor had worked 27 years for the employer. A non-work related knee injury required two operations to repair. When the employer selected workers for an out-of-province project, the grievor, who was laid off at the time, was not recalled to work on the project. The employer based that decision on the grievor's previous knee condition. The grievor claimed his rights to recall were violated by that decision.

AWARD: The grievance succeeds. The employer's decision not to recall the grievor was unreasonable because no attempt was made to determine his current physical condition. The employer should have taken reasonable steps to obtain accurate information about an employee's physical fitness. The grievor's seniority rights which lapsed while on lay off are restored according to terms in the award. He is also entitled to damages equal to the wages he would have earned had he been properly recalled, less any income earned through the employer's make-work projects.

DECISION: 91-108

Scotsburn Cooperative Services Ltd. AND Bakery, Confectionery & Tobacco Workers International Union, Local 446

DeMont, Eric G. - Arbitrator

Rene Quigley, for the Union
Malcolm MacLeod, for the Employer

November 21, 1991

ISSUES: Discipline and discharge - Grounds for 7:3000.

CIRCUMSTANCES: The Grievor received a five day suspension following an altercation with a customer. The Union argues this is too severe a penalty, and that it should be reduced to a warning. The Employer argues that customer relations are extremely important to it, and that it views the matter seriously.

AWARD: The grievance fails. The Grievor's conduct was serious enough to warrant discipline for jeopardizing the Employer's relationship with a significant customer.

DECISION: 91-109

Maritime Telegraph & Telephone Co. Ltd. AND Atlantic Communication & Technical Workers Union

Slone, Eric K. - Arbitrator

Ronald A. Pink, Leanne MacMillan, for the Union
Terry Roane, for the Employer

November 22, 1991

ISSUES: Discipline and discharge - Grounds for - Falsification of records 7:3324; Disciplinary penalties 7:4000 - Mitigating factors 7:4400.

CIRCUMSTANCES: The Grievor failed to disclose a medical condition as required when applying for a permanent position with the Employer. From the time of hiring to the time this was discovered, the Grievor was twice disciplined for incidents involving some dishonesty. The Employer argues that it has just cause to dismiss the Grievor for failure to disclose a medical condition. The Union argues that it would be a contravention of the

Human Rights Act for the Employer to refuse to hire the Grievor because of his condition.

AWARD: The grievance succeeds. Provided the Employer is able to be reasonably satisfied that the Grievor's condition does not make him unfit for his job, the Grievor is to be reinstated without loss of seniority but also without compensation. The arbitrator reviewed 11 criteria in assessing the impact of the Grievor's failure to disclose, and determined that the non-disclosure was material, and that it was not substantially mitigated by other factors. The Employer had the right to take the Grievor's condition into account when hiring him, and must be presumed to comply with the Human Rights Act. The arbitrator's moderation of the penalty reflects that it would be unfair to hold the Grievor to an enlightened standard regarding his type of condition that does not generally prevail in society, his remorse, personal circumstances, future job prospects, and the fact that he has already served penalties for the other two incidents.

DECISION: 91-110

McKenzie's Sales Ltd. AND Bakery, Confectionery & Tobacco Workers International Union, Local 446

MacDougall, R. Lorne - Arbitrator

Rene Quigley, for the Union
John Plowman, for the Employer

November 18, 1991

ISSUES: Skill and ability 6:3000 - Arbitral review 6:3100 - Senior employee if relatively equal 6:3220; Senior employee with required ability 6:3210.

CIRCUMSTANCES: The Grievor argues that as senior employee he should have been awarded a position as Shipper over another employee since they are equally qualified. The Employer argues the junior employee had better overall experience in all areas of its shipping operations.

AWARD: The grievance fails. The Grievor is not relatively equal in skill to the successful candidate. The decision of the Employer is reasonable.

DECISION: 91-111

Halifax (City) AND Municipal Assn. of Police Personnel

Kydd, William H. - Arbitrator

Ronald A. Pink, for the Union
Mary Ellen Donovan, for the Employer

October 16, 1991

ISSUES: Insurance and welfare plans - Entitlement to benefits 4:2100; Pyramiding of benefits 8:2140, 8:3140, 8:3250, 8:3330; Vacation 8:3210 - Computation of vacation and vacation pay 8:3230 - Sick 8:3330.

CIRCUMSTANCES: The Grievor alleges the Employer has failed to compensate him for holiday leave and vacation leave lost while he was off on workers' compensation. The Employer argues that the Grievor took a vacation trip, and is therefore not entitled to reschedule his vacation. The Grievor seeks to have his vacation and holiday leaves reinstated, and to take the leave at a mutually convenient time.

AWARD: The grievance succeeds. As the Grievor was not able to enjoy the vacation he had planned, the Employer is not able to deny his request to reschedule his vacation. The Collective Agreement specifies that holiday pay can be denied employees on workers' compensation which is not supplemented by the Employer. This infers that employees who are in receipt of a supplement from the Employer, such as the Grievor, will be entitled to holiday pay as a general provision of the applicable article. The Grievor is to be reinstated with the appropriate days' worth of vacation and holiday leave, to be taken at a mutually agreed upon time.

DECISION: 91-112

Nova Scotia Assn. of Hospital Organizations (Glace Bay Community Hospital) AND Canadian Brotherhood of Railway, Transport & General Workers, Local 607

O'Connell, Charles - Arbitrator

Victor Tomiczek, for the Union
Kenneth Fowlie, for the Employer

November 1991

ISSUES: Vacation 8:3210 - Computation of vacation and vacation pay 8:3220, 8:3230; Vacation 8:3210 - Strike 8:3220, 9:2210; Strikes and lockouts - Status of striking employees 9:2200 - Benefits 9:2210 - Service for vacation 8:3220.

CIRCUMSTANCES: The Grievor claims vacation credits earned during a period while she was on strike. The Employer argues time on strike is not part of years of service for calculation of vacation benefits.

AWARD: The grievance succeeds. There is no intent evident in the collective agreement to limit earned benefits such as vacation entitlement during a strike; such an intent would need to be clearly expressed before there could be interference with an earned benefit.

DECISION: 91-113

Nova Scotia (Department of Transportation & Communications) AND Canadian Union of Public Employees, Local 1867

Veniot, Milton J. - Arbitrator

Alex Sommerville, for the Union
Jonathan Davies, for the Employer

November 7, 1991

ISSUES: Seniority 6:0000 - Applications 6:2000 - Layoff 6:2000, 6:2200; Skill and ability 6:3000 - Arbitral review 6:3100 - Senior employee with required ability 6:3210; Criteria of ability and qualifications 6:3300.

CIRCUMSTANCES: The Employer's work cycle necessitates seasonal layoffs, which are done by order of seniority, and whether or not the senior employee is qualified to do the available work remaining. The Grievor claims that he was improperly laid off in that he

was qualified to do a remaining job of asphalt raker. The Employer claims the Grievor is not qualified.

AWARD: The grievance fails. There are skills learned through experience required to do the work, and the Grievor lacks these skills. The Grievor is unable to discharge the burden of demonstrating he is qualified to perform the job requirements of the available work.

DECISION: 91-114

Comstock Canada AND International Brotherhood of Electrical Workers, Local 625

Mont, Stephen K. - Arbitrator

n/a, for the Union
n/a, for the Employer

November 19, 1991

CIRCUMSTANCES: The parties reached a settlement at the grievance hearing.

AWARD: The grievance is settled and a withdrawal is granted.

DECISION: 91-115

Gulf Seafoods Inc. AND National Automobile, Aerospace & Agricultural Implement Workers Union of Canada (CAW-Canada), Local 1944

MacLellan, J.A. - Arbitrator

Leo McCormick, for the Union
Robert MacLure, for the Employer

December 4, 1991

ISSUES: Seniority 6:0000 - Shift assignment 6:2000; Management rights 5:0000.

CIRCUMSTANCES: An employee in another classification did work on a four-hour shift that the Grievor alleges he should have been called in to do. The Employer argues that it has the right to assign work so long as the employee assigned is qualified to do the work. The Union argues that seniority applies within the classification, and not just at the plant level.

AWARD: The grievance fails. There is nothing in the collective agreement to prohibit the Employer using more senior employees who are qualified to do the work, no matter what their classification. Seniority is construed from the agreement as being on a plant-wide basis.

DECISION: 91-116

Dort's Ambulance Services Ltd. AND Canadian Union of Public Employees, Local 3281

MacLellan, J.A. - Chair; Tynes, Michael; Lynn, John

Robert Crockett, for the Union
Peter McLellan, for the Employer

November 28, 1991

ISSUES: Discipline and discharge - Grounds for 7:3000 - Alcoholic beverages 7:3650, 7:3010.

CIRCUMSTANCES: The Grievor, a part-time ambulance attendant, was discharged for allegedly reporting to work while his ability was impaired by alcohol. He seeks reinstatement.

AWARD: The grievance fails. The Grievor seriously compromised the very high standard placed on ambulance attendants with respect to their conduct and performance. The Board is not persuaded that it should interfere with the Employer's decision to discharge.

DECISION: 91-117

General Eastern Homes Ltd. AND United Brotherhood of Carpenters & Joiners of America, Local 2215

Kydd, William H. - Arbitrator

Gordon N. Forsyth, for the Union
Peter McLellan, for the Employer

November 22, 1991

ISSUES: Discipline and discharge - Grounds for 7:3000 - Fighting or threatening 7:3430; Theft 7:3310; Disciplinary penalties 7:4000 - Mitigating factors 7:4400 - Provocation 7:4412 - Assault 7:3430.

CIRCUMSTANCES: The Grievor received a five day suspension for allegedly misappropriating funds belonging to the Employer. He was later discharged for allegedly threatening and intimidating another employee. The Union claims that no discipline is warranted with respect to the first incident, and that discharge is too severe a penalty for the second.

AWARD: The grievance succeeds in part. The suspension is justified with respect to the first incident. Discharge is too severe a penalty for the second incident, given there was some provocation. Another employee had received a five-day suspension for a similar infraction. The discharge is revoked and a two-week suspension is substituted.

DECISION: 91-118

N.S. Drywall Ltd. AND Labourers International Union of North America, Local 615

Mont, Stephen K. - Arbitrator

n/a, for the Union
n/a, for the Employer

December 13, 1991

ISSUES: Remedies - Type of remedy - Compliance order 2:1450.

CIRCUMSTANCES: The Employer admits it is in violation of the collective agreement by not remitting payment for benefits as required.

AWARD: The grievance succeeds. The Employer is to pay an agreed amount to the union.

DECISION: 91-119

Nova Scotia (Department of Transportation and Communications) AND Canadian Union of Public Employees, Local 1867

Veniot, Milton J. - Arbitrator

Lionel Clarke, for the Union
Jonathan Davies, for the Employer

December 9, 1991

ISSUES: Grievance - Settlement of grievance 2:3230.

CIRCUMSTANCES: The union's grievance alleged the employer violated the agreement by terminating the grievor's job.

AWARD: At the arbitration, the parties indicated they had settled the grievance. By terms of the consent order incorporated into the award, the grievor's notice of termination was withdrawn and further conditions were agreed to regarding the grievor's seniority and completion of her probationary period.

DECISION: 91-120

Town Daycare Centre AND Canadian Brotherhood of Railway, Transport & General Workers, Local 620

Elman, Frank L. - Arbitrator

Lynn Pollock, for the Union
Darlene MacRury, for the Employer

December 10, 1991

ISSUES: Seniority 6:0000 - Acquisition 6:1100; Interpretation 4:2000, 4:2100, 4:2300 - Ambiguity 3:4400 .

CIRCUMSTANCES: The grievors dispute the Employer's dates of hire on its seniority list.

AWARD: The grievances fail. The Collective Agreement is unambiguous in excluding temporary and trainee service from the calculation of seniority.

DECISION: 91-121

Maple Leaf Foods Inc. AND Energy & Chemical Workers Union, Local 54

Kydd, William H. - Arbitrator

Paul Murphy, for the Union
John T. Rafferty, for the Employer

November 22, 1991

ISSUES: Management rights - Fairness 4:2300; Work assignment - Fairness 4:2300; Interpretation - Reasonableness 4:2100; Working hours and shifts - Reasonableness 5:3100.

CIRCUMSTANCES: The grievance involved a claim for extra pay arising out of additional job duties assigned to the grievor, who drove a tractor-trailer hauling meat by-products. When an extra stop was added to the grievor's weekly route, he estimated this stop required an additional 5 hours work. The grievor claimed a total of twenty extra stops should be compensated at the overtime trip rate, according to the agreement. The employer argued that the extra stop was not a "trip" because the grievor was not required to return to the main plant from his regular route, prepare his truck, drive to the area specified and then come back to the plant.

AWARD: The grievance fails. By overtime terms in the agreement, drivers are paid on the basis of trips, rather than hours worked. Overtime is paid only if there is an additional trip. To allow the grievor's claim and pay him on an hourly basis would give him an entitlement not contained in the agreement. In relying on the employer's definition of "trip", the additional stop on the grievor's normal route did not constitute a separate trip. Nor has the employer acted unreasonably in adding the extra stop.

DECISION: 91-122

Chateau Halifax AND Hotel & Restaurant Employees & Bartenders Union, Local 662

Slone, Eric K. - Arbitrator

Raymond Larkin, for the Union
Eric Durnford, for the Employer

December 20, 1991

ISSUES: Job classifications and descriptions - Creation or revision - Burden of proof 3:2414, Change of work load/job function 5:2410; Management rights - Revision of job content 5:2200; Work assignment - Changes in job function 5:2410.

CIRCUMSTANCES: A group grievance filed by restaurant waiters alleged the employer violated the agreement by assigning additional cashier duties without negotiating an increase in the grievors' wages. When the employer installed computerized record keeping equipment, the cashier position was eliminated and waiters became responsible for all monetary transactions. On the employer's evidence, it was noted that the waiters had generally handled money and credit cards as part of their normal job function prior to the elimination of the cashier's position. The employer maintained that management rights allowed it to eliminate positions and to re-assign job duties. The union argued that where there have been changes made in job content, it had the right to be notified of such changes and the right to negotiate new wage rates.

AWARD: The grievance fails. There must be a substantial qualitative change in a job before reclassification can result. In this case, there was a change of duties, rather than the creation of a new classification. The major job content of the grievors' positions had not changed. The union has not discharged its burden of proving that there had been a change to the integral job structure of waiter.

DECISION: 91-123

Cove Guest Home AND Canadian Brotherhood of Railway, Transport & General Workers, Local 620

Elman, Frank L. - Arbitrator

Victor Tomiczek, for the Union
Warren MacDonald, for the Employer

November 20, 1991

ISSUES: Vacation 8:3210, Computation of vacation and vacation pay - Sick 8:3330; Statutory holidays - Active employment relationship 8:3120, Holiday pay and other benefits - Sick leave benefits 8:3330; Procedure - Powers of board of arbitration - Preliminary objections 3:2100.

CIRCUMSTANCES: Two full-time employees grieved the employer's denial of their holiday benefits while they were on extended sick leave. Because their sick leave was funded by the Unemployment Insurance Commission, the employer argued that the grievors' rights to vacation and holiday benefits in the agreement had ended. One of the grievors also claimed the employer arbitrarily reduced her vacation entitlement. The employer argued that vacation credits must be earned by actual days worked. The grievor maintained that she was entitled to her full vacation because she maintained her status as a full-time employee.

AWARD: The grievances succeed. The grievors, as full-time employees, are entitled to all the benefits of the agreement. An employee does not cease to be an employee when her paid sick leave benefits have been used. Similarly, because nothing in the agreement disentitles the grievor from her vacation credits, she is entitled to full vacation pay as a regular employee. The employer's objection as to the timeliness of the grievance is rejected on two grounds: first, the issue was not raised prior to the hearing and second, the employer failed to give notice that the objection would be an issue in the arbitration. Jurisdiction is reserved should the parties be unable to agree as to compensation.

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